United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7591, 77-7016

United States Court of Appeals

FOR THE SECOND CIRCUIT

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN AND DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

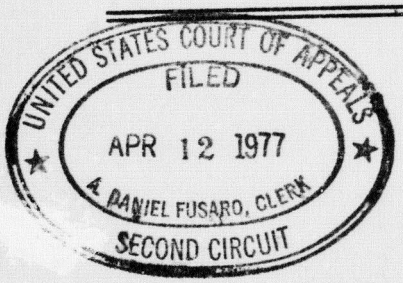
v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY AND NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ISRAEL AIRCRAFT INDUSTRIES, LTD.



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United States Court of Appeals

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ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN AND DALIA KOREN,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ISRAEL AIRCRAFT INDUSTRIES, LTD.

Preliminary Statement

These are appeals from two Orders of the Honorable Robert L. Carter, *D.J.*, (1) dismissing the subrogation complaint of appellant Israel Aircraft Industries, Ltd. (hereinafter Israel Aircraft) after a jury verdict on the issues of liability and damages in favor of Israel Aircraft and (2) denying reargument and reconsideration of the dismissal Order.

The Opinion and Order dismissing the complaint are reported at 72 F.R.D. 456 and are printed in the Addendum to this Brief, commencing at Add. p. A1; App. p. 209a.

The Opinion and Order denying reargument and reconsideration are not yet reported but are printed in the Addendum to this Brief commencing at Add. p. A18; App. p. 337a.

The appeals are taken pursuant to 28 U.S.C. 1291. While separate notices of appeal were filed from the two Orders of the District Court, the appeals have been consolidated in this one proceeding by Order of this Court dated January 18, 1977.

I

Statement of the Issues Presented For Review

In considering certain post-trial motions, the Court below dismissed *sua sponte* the subrogation property damage complaint of Israel Aircraft because certain releases obtained from the individual personal injury co-plaintiffs, employees of Israel Aircraft, were not brought to the attention of the Court until after the conclusion of the trial. The Court granted this drastic relief even though the uncontroverted evidence concerning the releases showed that (1) prior to the jury's liability verdict Israel Aircraft had no reason to believe and was unaware that the releases had any relevance to the issues in the subrogation property damage action; (2) counsel for Israel Aircraft had no reason to believe prior to that verdict that such releases existed; (3) immediately upon learning of the possibility of the existence of the releases, counsel for Israel Aircraft obtained copies of the documents and furnished them to the District Court in connection with the pending post-trial motions; and finally, (4) the District Court dismissed the subrogation complaint *sua sponte* without deciding the legal effect of the releases on any of the issues in the subrogation action or in the related personal injury actions by the individual plaintiffs, even though the releases were unrelated to the property damage claim of Israel Aircraft.

This appeal, therefore, presents the following questions for review:

1. Whether the failure of Israel Aircraft or its attorneys to produce the releases until after the trial of the

property damage action constituted a "fraud upon the court" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure such as to mandate the dismissal by the District Court, *sua sponte,* of the complaint?

2. Whether the failure of Israel Aircraft or its attorneys to produce the releases until after the trial of the property damage action warranted the imposition of the ultimate sanction of dismissal under Rule 37 of the Federal Rules of Civil Procedure?

3. Whether, in this subrogation action for property damage only, it was proper for the District Court to dismiss *sua sponte* the complaint, following a jury verdict on liability and damages in favor of Israel Aircraft, without determining the legal effect of the releases and even though the releases may not have had any legal effect on the claims asserted?

II

Statement of the Case

1. Nature of the Case.

This is a subrogation property damage action arising out of the crash of a Jet Commander aircraft owned by Israel Aircraft which occurred in Israel on January 21, 1970 and resulted in the total destruction of the aircraft.

Liability was alleged in the complaint against the defendants[1] upon the basis of alleged breach of warranty and negligence in the design, manufacture and testing of the wing flap system of the aircraft. The subrogation complaint of Israel Aircraft sought to recover damages totalling $1,000,000. At the trial the jury found that the accident was caused in part by the malfunction of the wing flap actuator manufactured by defendant Standard Precision,

[1] Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company and North American Rockwell Corporation.

a Division of Electronic Communciations, Inc. (hereinafter Standard Precision).

The crew on board the aircraft at the time of the malfunction, employees of Israel Aircraft, bailed out of the aircraft before it crashed. Three of the crew, Zohar Landau (hereinafter Landau), Mordechai Muscatel (hereinafter Muscatel) and Hagai Koren (hereinafter Koren) joined in the action against defendants in the Court below seeking to recover damages for personal injuries sustained by them when they were forced to bail out of the aircraft.[2]

2. The Course of the Proceedings.

The action was commenced in the Southern District of New York on December 21, 1972 by the filing of a joint complaint which included the subrogation property damage claim of Israel Aircraft and the personal injury claims of Landau and Muscatel. Prior to issue being joined, the joint complaint was amended to include the personal injury claim of Koren. (App. p. 5a). The defendants answered and interposed a counterclaim against plaintiff Israel Aircraft for indemnity and contribution for any damages they might be required to pay the crew members. (App. p. 57a).

The issues raised by the property damage claim and the personal injury claims were the subject of a joint jury trial in the Court below. The trial was bifurcated with the issue of liability being tried first. Applying the law of Israel, the jury returned a comparative negligence verdict finding Standard Precision 35 percent responsible for the accident and Israel Aircraft 65 percent responsible for the accident.[3] (App. p. 358a).

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[2] The personal injury complaint of these plaintiffs also was dismissed in its entirety by the District Court *sua sponte* in the same dismissal Order as appealed from herein. The dismissal of the complaint of Landau, Muscatel and Koren is the subject of a separate appeal to this Court, No. 76-7613.

[3] The jury did not find any liability on the part of North American Rockwell Corporation. No issue concerning any responsibility of the crew for the accident was submitted to the jury. Standard Precision, Electronic Communications Inc. and The Na-

The jury was immediately reconvened for trial of the damage issues and found that the value of the destroyed aircraft was $860,000.00 and that the damages of Landau, Muscatel and Koren were, respectively, $275,000, $135,000 and $15,000. (App. p. 366a).

Standard Precision moved for a new trial on the issues of its liability to the crew members for their personal injuries and on the issue of damages awarded by the jury to Israel Aircraft and the crew. (App. p. 182a-1).

Based upon information obtained post-verdict, counsel for Israel Aircraft filed a post-trial motion to dismiss the counterclaim of Standard Precision and to reduce the damages awarded by the jury to the crew members by the 65 percent share of responsibility assessed against Israel Aircraft. (App. pp. 183a, 195a). The basis for the motion was that the crew members had been compensated by Israel Aircraft pursuant to the law of Israel and had released all of their claims against Israel Aircraft. Israel Aircraft asserted that the legal effect of the releases was to preclude any further liability whether direct or indirect.

On March 29, 1976, the District Court denied the motion of Standard Precision for a new trial. (App. p. 194a). Thereafter, on April 19, 1976, Standard Precision filed a new motion to amend its answer to the complaint of the crew members to assert the releases given to Israel Aircraft as a complete defense and for summary judgment dismissing their complaint upon the basis of the releases. (App. p. 196a). It was contended by Standard Precision that the legal effect of the releases was to bar any claims by the crew members against anyone for their personal injuries sustained in the accident.

Standard Precision did not seek any relief against Israel Aircraft in this new motion.

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tional Cash Register Company are related corporations and were treated by the Court below as one entity, referring to them always as Standard Precision or SP.

3. The Disposition in the Court Below.

On October 26, 1976, the District Court, in considering the various pending post-trial motions, concluded that Israel Aircraft and the crew members had "perpetrated a fraud on the court" in not bringing the existence of the releases to the attention of the Court until after the trial was concluded. (Add. p. A1; App. p. 209a). The Court did not rule on the scope and legal effect of the releases under the law of Israel or the relevance of the releases to any of the claims or defenses at issue, as requested in the post-trial motions filed by Israel Aircraft and Standard Precision. Rather, the Court concluded that late disclosure of the releases constituted a fraud on the Court within the meaning of Rule 60 of the Federal Rules of Civil Procedure and required extreme sanctions under Rule 37. Although the post-trial motion of Standard Precision for summary judgment was directed only against the crew members, the Court below, nevertheless, dismissed the property damage complaint of Israel Aircraft in the following Order:

> "Accordingly, the complaints of the plaintiff crew members and plaintiff IAI [Israel Aircraft] are dismissed in their entirety by the court *sua sponte*. The cross-motions are denied as moot. Defendants SP [Standard Precision] and Rockwell [North American Rockwell Corporation] are awarded their costs." (Add. p. A17; App. p. 225a).

This Order was entered on October 27, 1976. A timely notice of appeal from the Order was filed by Israel Aircraft on November 26, 1976. (App. p. 335a).

Israel Aircraft and the crew members filed motions for reargument and reconsideration of the dismissal of their complaint. (App. pp. 238a, 247a). These motions were denied in an Opinion and Order dated January 4, 1977. (Add. p. A18; App. p. 337a). A timely notice of appeal from this Order was filed by Israel Aircraft on January 12, 1977. (App. p. 347a).

The two appeals were consolidated in this one proceeding by Order of the Honorable William H. Mulligan dated January 18, 1977 on motion of Israel Aircraft.

4. Statement of the Facts Relevant to the Issues Presented for Review.

A. *Pre-litigation Background.*

On January 21, 1970, a Jet Commander aircraft owned by Israel Aircraft[4] developed a wing flap malfunction while on a test flight in Israel which necessitated inflight evacuation of the aircraft by the crew and resulted in the subsequent crash and total destruction of the aircraft. The aircraft was fully insured and Israel Aircraft was paid over $800,000 by its London-based insurers for the loss of the aircraft.

After the crash and prior to the commencement of litigation in the Court below, the three injured crew members received disability pension payments from the National Insurance Institute of Israel and additional compensation payments from their employer, Israel Aircraft. (App. p. 326a). In accordance with the law of Israel and without admitting any responsibility for the accident, Israel Aircraft paid Landau 75,000 Israeli pounds, Muscatel 10,000 Israeli pounds and Koren 5,000 Israeli pounds (approximate total $11,000). These payments were termed "ex gratia" payments because at the time they were made Israel Aircraft did not consider itself under any legal obligation to make such payments to the crew members. Nonetheless, when the payments were made, Israel Aircraft obtained from each crew member a deed of release precluding any further claims by or on behalf of the crew members

> "against IAI [Israel Aircraft] and/or the Ministry of Defense and/or any one of them and/or any other

[4] Israel Aircraft is an Israeli company engaged in the manufacture and sale of aircraft and related products which does approximately $100,000,000 business per year in the United States and is one of the largest and most respected companies in Israel. (App. p. 246a).

person, and/or legal entity in their name and/or in their stead, in respect of said the accident . . ." (App. pp. 187a, 190a, 192a).

The deeds of release further stated that the payments were made ". . . in complete, final and full settlement of all my claims and demands against IAI . . ." (App. pp. 186a, 189a, 192a). Landau's release was executed on January 20, 1971, Muscatel's March 1, 1971 and Koren's July 3, 1970. (App. pp. 188a, 191a, 194a).

It was Israel Aircraft's understanding that the releases were effective to bar any future or further claims for compensation by the crew members against Israel Aircraft, but did not serve to bar claims by the crew members against any third parties. (App. p. 301a). These releases were read and explained to the crew by Israeli counsel for Israel Aircraft prior to their execution. (App. p. 310a).

Having paid Israel Aircraft for the loss of the aircraft, the insurers, as subrogees to the rights of Israel Aircraft, appointed the law firm of Condon & Forsyth to bring a subrogation action in the United States to recover damages occasioned by the loss of the aircraft.

Prior to the commencement of this action in late December, 1972, Condon & Forsyth also were asked to represent the crew members in their personal injury claims against defendants. On September 13, 1972, a pre-litigation questionnaire (App. p. 326a) was forwarded at the request of Condon & Forsyth to Israel Aircraft setting forth a series of questions to be answered by the crew members to obtain information concerning their personal injury claims.[5] The

[5] In its Opinions the Court below erroneously characterized this informal questionnaire, which actually was forwarded to Israel Aircraft by London counsel for the London-based insurers of Israel Aircraft, as "defendants' interrogatories" and the answers likewise were erroneously characterized as "answers to interrogatories". This mischaracterization had serious effects in the Opinions of the Court below because the Court treated this informal pre-litigation questionnaire and the answers thereto as if they were formal written interrogatories and answers propounded and responded to under Rule 33 of the Federal Rules of Civil Procedure (Add. p. A8; App. p. 216a).

answers to the questionnaire were received by Condon & Forsyth on November 28, 1972.

Among the answers given by Landau to this informal questionnaire were the following:

> "11. Details of any injury insurance payments under the State scheme (interim and final payments).
>
> [A.] 11. Interim payment (temporary disability—IL 2068.75).
>
> Permanent disability—pension of IL 361.20 per month.
>
> 12. Details of any injury payments made by IAI [Israel Aircraft].
>
> [A.] 12. Injury payment and reparation for the loss of future income of the amount of IL 75,000 were made by IAI.
>
> 13. Whether or not any of the above-mentioned payments are taken into account and deducted from damages under Israeli law.
>
> [A.] 13. The capitalised value of the pension is taken into account under Israeli law. The payment made by IAI is not a subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds." (App. p. 329a).

Similar answers were given by Muscatel and Koren. (App. pp. 332a, 333a).

B. *Litigation and Pre-Trial Proceedings.*

On December 21, 1972, a subrogation action was commenced in the name of Israel Aircraft on behalf of their insurers in the United States District Court for the Southern District of New York.

On July 5, 1973, the Court below convened a pre-trial conference at which Standard Precision and North American Rockwell Corporation (hereinafter Rockwell) served

plaintiffs' counsel, Condon & Forsyth, with their answers and counterclaim to the complaint[6] (App. p. 54a) and a Notice for Production of Documents by the plaintiffs. (App. p. 58a).

The Notice for the Production of Documents included eleven items or categories of documents, Item No. 11 of which sought production of the following:

> "11. All personnel records of the individual plaintiffs which are in the possession or control of ISRAEL AIRCRAFT INDUSTRIES, LTD., including but not limited to payroll, medical, hiring, training, and work of the individual plaintiffs as employees of said ISRAEL AIRCRAFT INDUSTRIES, LTD.". (App. p. 60a).

This Notice to Produce including Item No. 11 was never transmitted to Israel Aircraft by anyone.

By agreement among counsel, plaintiffs' counsel met with defendants' counsel to mark and produce documents in response to the Notice on July 18, 1973, August 29, 1973 and January 10, 1974. (App. p. 349a; Record Nos. 101, 102, 103). The typewritten transcripts of these sessions, totalling approximately 225 pages, reflect that nearly 120 separate exhibits, comprising several hundred individual documents, were marked for identification. (App. p. 349a; Record Nos. 101, 102, 103). The following colloquy between counsel took place at the end of the third marking session on January 10, 1974:

> "MR. FITZSIMONS [Defendants' Counsel]: Do you have anything at all to produce with respect to Item No. 11 calling for the personnel records of the individual plaintiffs?

---

[6] These answers contained a counterclaim against Israel Aircraft with respect to the personal injury claims reading:

> "however, if any such product was defective, unsafe or unfit for its intended use on the date of the accident, such condition was caused by the wrongful acts of Israel Aircraft Industries, Inc., and these defendants are therefore entitled to be indemnified by, and have contribution from said, Israel Aircraft Industries, Inc." (App. p. 57a).

> MR. SCHIERBERL [Plaintiffs' Counsel]: Not at this time. We are obtaining those records and as soon as we have them I will give them to you." (App. p. 350a).

Between January 10, 1974 and July 2, 1974, Condon & Forsyth provided counsel for defendants with copies of all documents and things which had been produced at the January 10, 1974 marking session. (App. p. 287a). In a May 13, 1974 letter to Mendes & Mount, counsel for defendants, advising defendants that the failed parts were available for their inspection, Condon & Forsyth wrote:

> "Further, if there are any other items which we have not yet provided, kindly inform us and we shall endeavor to accommodate you." (App. p. 293a).

The only response to this letter was that defendants requested the physical evidence, the failed parts, be delivered to defendants' expert in California. This request was complied with on June 28, 1974. (App. p. 169a).

Pursuant to a schedule agreed upon by counsel for all parties, the depositions of defendants commenced on July 2, 1974.[7] At the close of the deposition of defendants' first witness on July 2, 1974, Mr. Murphy, counsel for Standard Precision, submitted a handwritten note to counsel for Israel Aircraft requesting the production of certain engineering drawings, and asking in addition:

> "Request authorization to obtain Medical Records of Plaintiffs." (App. p. 135a).

This was the only request received by Condon & Forsyth after the January 10, 1974 marking session for documents relating to the personal injury claims of the crew members.

---

[7] The depositions of Israel Aircraft and the personal injury plaintiffs were scheduled to commence after completion of the depositions of all defendants' witnesses, by agreement among counsel.

In response to this request, Condon & Forsyth (1) obtained the engineering drawings from Israel and provided them to defendants (App. p. 136a), and (2) prepared Authorizations to Obtain Medical Records to be executed by the crew members when they arrived in New York for their depositions.

C. *The Substitution of Separate Counsel for the Crew Members and Their Depositions.*

Shortly after the crew members arrived in New York for their depositions, they informed Condon & Forsyth by telephone on July 16, 1974 that the firm of Fuchsberg & Fuchsberg was to be substituted as their attorneys in lieu of Condon & Forsyth.

Consequently, prior to commencement of the depositions of the crew member plaintiffs on July 22, 1974, Condon & Forsyth provided Fuchsberg & Fuchsberg with copies of all documents in its files concerning the crew, including copies and translations of medical records and their answers to the pre-litigation informal questionnaire. (App. p. 323a). These documents also were given to counsel for defendants prior to the start of the depositions of the crew members. App. p. 323a).

At the depositions of the crew members, counsel for Standard Precision examined each crew member plaintiff to his apparent satisfaction.[8]

Each crew member was asked about the payments made to him by Israel Aircraft following the accident. However, no questions were asked concerning any releases or other documents executed by any of the crew members in connection with these payments. The following excerpt from the Muscatel deposition is illustrative of the testimony elicited by counsel for Standard Precision from all

---

[8] Defendants' deposition of Landau commenced at 10:00 A.M. July 22, 1974 and was concluded at 2:00 P.M. of the same day. Muscatel's deposition commenced at 3:00 P.M. and was concluded at 5:25 P.M. on July 24, 1974. The Koren deposition was begun at 12:00 noon and concluded at 4:55 P.M. on September 5, 1974. Condon & Forsyth attended each of these depositions as counsel for Israel Aircraft but did not participate in the questioning of the deponents. (App. pp. 351a, 353a; Record Nos. 104, 105, 106).

three crew members on this point at their respective depositions:

MR. MURPHY [Defendants' Counsel]:

"Q. Is there an agreement with your employer, I.A.I., that you must pay them back money they have paid you if you receive money in this lawsuit?

A. Yes.

Q. Can you tell me how much money you received in benefits or pensions as a result of these injuries up to the present time?

A. Yes, I've got 10,000 pounds.

Q. Was that a single payment from your employer?

A. Single time, once.

Q. Do you now receive any pensions from either the government or your employer as a result of the injuries?

A. Not right now, but I did get, because of my temporary invalidity." (App. p. 353a).

Counsel for the individual crew member plaintiffs, Mr. Cousins of Fuchsberg & Fuchsberg, supplemented Mr. Murphy's questions concerning the payments from Israel Aircraft as follows:

"Q. Can you tell us what the 10,000 pounds lump sum payment you received from I.A.I. represented?

A. I think there was an agreement between me and I.A.I. to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that.

Was this money paid to you as a result of your injuries sustained in this accident?

A. Yes.

Q. Pursuant to the agreement between yourself and I.A.I., this money must be repaid to them out of any you might get as a result of this lawsuit?

A. Yes."

(App. p. 354a).

At no point during his questioning of the three crew members did counsel for Standard Precision ask any questions concerning the existence, nature or scope of any agreements with Israel Aircraft; similarly, none of the crew members was asked of the existence of any releases in relation to the payments received from Israel Aircraft; and, finally, none of them was asked to produce any documents relating to the payments during their respective depositions.

Thus, the medical records, the written answers to the informal questionnaire and the deposition testimony of the individual plaintiffs were the only information known by defendants' counsel and Condon & Forsyth concerning the payments by Israel Aircraft to the individual plaintiffs. From this information, said counsel assumed the payments to be in the nature of workmen's compensation benefits, as generally paid in the United States under similar circumstances. (App. p. 228a).

In view of this assumption, Condon & Forsyth did not consider the payments to be relevant to any of the issues in the pending action. Accordingly, at no time prior to the trial did Condon & Forsyth ask Israel Aircraft for any further information concerning these payments or whether any documents existed in relation thereto. The defense of Standard Precision's counterclaim was routinely handled by Condon & Forsyth as part of the overall subrogation action. In view of this, the specific attention of the nominal plaintiff, Israel Aircraft, was not called to the existence of the counterclaim or the defense of same in the subrogation action.

In summary, Israel Aircraft had no reason to believe and was unaware that the releases obtained from the crew members in Israel had any relevance to the issues in the action pending in New York. Condon & Forsyth had no reason to assume or conclude that the payments made by Israel Aircraft were other than routine workmen's compensation type payments and, therefore, they had no rea-

son to assume that any documents relating to the payments were in existence. No further request was forwarded to Israel Aircraft by any party or their attorneys prior to the trial inquiring about the payments or the existence of any documents relating thereto.

D. *Defendants' Pre-trial Discovery Motions.*

On September 30, 1974, approximately three weeks after completion of the Koren deposition, Standard Precision and Rockwell moved to dismiss the complaint and all claims asserted therein on the ground that all plaintiffs had failed to answer certain interrogatories and produce documents including the personnel records of the crew. (App. p. 101a). The interrogatories had been served in June, 1974 on the eve of the commencement of the depositions of the parties. In view of this, all counsel had agreed that answers would only be required if, after completion of the depositions, defendants' counsel expressly requested answers to specific interrogatories which had not been answered by the witnesses at the depositions. (App. p. 123a). No such request was ever made by defendants' counsel.

In opposing the motion to dismiss, counsel for Israel Aircraft set forth the above agreement of counsel with respect to the answers to the interrogatories. Additionally, with respect to the outstanding request to produce the personnel records of the crew members, counsel for Israel Aircraft stated:

> "(3) Upon information and belief, the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel." (App. p. 119a).

No attorney for any of the other parties disputed the affidavit of counsel for Israel Aircraft setting forth these statements, although it was served upon them, or advised

that the personnel records were not being produced as indicated.

No papers were submitted by Fuchsberg & Fuchsberg on behalf of the crew members in opposition to defendants' motion to dismiss. Defendants' reply to the papers of Condon & Forsyth made no mention of the personnel records. (App. p. 125a).

On November 15, 1974, the District Court denied defendants' motion to dismiss the complaint under Rule 37 for failure to answer interrogatories and produce documents. (App. p. 139a).

No further requests for the production of documents or answers to interrogatories were made by Standard Precision or Rockwell to Israel Aircraft. Between the denial of defendants' motion to dismiss on November 15, 1974 and the commencement of trial on January 12, 1976, the only discovery which took place was defendants' re-examination of the failed parts and the deposition of an aeronautical expert witness of Israel Aircraft.

E. *The Post-Trial Motions and Discovery of the Releases.*

The liability trial concluded on January 27, 1976 in a jury verdict finding Standard Precision 35 percent at fault and Israel Aircraft 65 percent at fault for the accident. The damage trial commenced immediately before the same jury.

On or about January 29, 1976, after return of the verdict on liability but before the damage verdicts were reached, Mr. Cousins of Fuchsberg & Fuchsberg, counsel for the plaintiff crew members, advised Mr. Schierberl of Condon & Forsyth, counsel for Israel Aircraft, that Landau believed he might have signed a document written in Hebrew which could affect his ability to recover a judgment against Israel Aircraft. (App. p. 227a). Mr. Schierberl, on January 31, 1976, telexed Israel Aircraft in Israel to inquire

about such a document and to obtain a copy if it existed. (App. p. 232a).

On February 4, 1976, the jury returned its damage verdict finding that the value of the aircraft was $860,000 and that the damages for the personal injuries of Landau, Muscatel and Koren were $275,000, $135,000 and $15,000 respectively. (App. p. 367a). Upon returning to his office after the jury verdict, Mr. Schierberl received a telex reply to his inquiry of January 31, 1976, consisting of (1) a rough translation of a Hebrew document, which appeared to release Israel Aircraft from any liability to Landau, and (2) advice that similar documents had been executed by Muscatel and Koren. (App. p. 234a). Mr. Schierberl immediately retained Israeli counsel to review the releases and render an opinion on their legal effect under the law of Israel. (App. p. 228a). Mr. Schierberl also made arrangements to travel to Israel to review the releases and to determine the circumstances of their execution with Israel Aircraft. On March 15, 16 and 17, 1976, Mr. Schierberl conferred in Israel with Israel Aircraft and Israeli counsel concerning the history and legal significance of the releases. (App. p. 228a).

Immediately after these consultations and in view of the possible effect of the releases on the verdicts in New York, Mr. Schierberl telephoned counsel for Standard Precision in New York from Israel and advised him of the existence and contents of the releases. (App. p. 230a).

Upon Mr. Schierberl's return to the United States and as part of a cross-motion to Standard Precision's pending motion for a new trial, Israel Aircraft on March 26, 1976 raised the releases as a defense to Standard Precision's counterclaim and moved for the reduction of the crew members' recovery from Standard Precision by the amount of Israel Aircraft's proportionate 65 per cent share of the liability. (App. p. 183a). Copies of the translations of the releases were annexed to the motion papers. (App. p. 186a).

The pending motion of Standard Precision for a new trial was denied on March 29, 1976. (App. p. 194a). Thereafter, on April 19, 1976, and in response to Israel Aircraft's motion raising the releases as a defense to the counterclaim, Standard Precision itself cross-moved for leave to amend its answer to assert the releases as complete defenses to the crew members' personal injury claims and for summary judgment dismissing their complaint. (App. p. 196a). Standard Precision did not seek any relief in this cross motion against Israel Aircraft in the subrogation action.

On October 26, 1976, while expressly declining to determine the legal effect of the releases upon any of the issues before it on the post-trial motions, the Court below nevertheless decided that:

> "IAI's failure to produce the releases, Schierberl's false assurance to defendants that the entire crew members' files would be forwarded, Muscatel and Landau's false answers to written questions and Muscatel's misleading response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the defendants, court and jury of information having an important bearing on the dispute." (Add. p. A17; App. p. 225a).

The Court below then dismissed the subrogation complaint of Israel Aircraft in its entirety *sua sponte* and subsequently denied a motion for reargument and reconsideration as well as a request for an evidentiary hearing on the finding of "fraud on the court".

This appeal followed.

ARGUMENT

POINT I

The Finding That Israel Aircraft and Its Attorneys Fraudulently Withheld the Releases and Committed a Fraud Upon the Court Under Rule 60(b) Is Contrary to the Evidence in the Record.

Although no motion was made to dismiss Israel Aircraft's claim for property damage, the Court below, *sua sponte,* dismissed the complaint of Israel Aircraft pursuant to Rule 37 of the Federal Rules of Civil Procedure because he concluded that plaintiff Israel Aircraft had participated in a fraud upon the Court under Rule 60(b).

The Court found that the releases executed by plaintiff crew members in favor of Israel Aircraft prior to the commencement of the action were fraudulently withheld by plaintiffs until after the trial.

From an examination of the law and the evidence, it is manifest beyond question that no fraud was perpetrated on the Court below.

A. "Fraud upon the Court" Requires the Existence of an Unconscionable Plan Defiling the Court and Subverting the Decision-Making Process.

The Court below, in holding that a fraud upon the court had been committed, invoked Rule 60(b) in vacating the verdict rendered in favor of Israel Aircraft.

Rule 60(b) provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> • • •
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> • • •

> This Rule [Rule 60(b)] does not limit the power of a court . . . to set aside a judgment for fraud upon the court."

To set aside a judgment under Rule 60(b) because of fraud upon the court, it is necessary to show "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *England* v. *Doyle*, 281 F.2d 304 at 309 (9th Cir. 1960). Professor Moore has stated:

> "'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjuding cases that are presented for adjudication."

7 MOORE'S FEDERAL PRACTICE ¶60.33 at 515. *Accord, Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F.2d 798 at 801 (2d Cir. 1960). *See also United States* v. *International Telephone & Telegraph Corp.*, 349 F.Supp. 22 (D.Conn. 1972); *Lockwood* v. *Bowles*, 46 F.R.D. 625 (D. D.C. 1969).

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. *United States* v. *International Telephone & Telegraph Corp.* 349 F.Supp. at 28-29. *See Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 at 717 (10th Cir. 1972). In order that fraud on the court be found, the fraud must actually affect the decision-making process. Thus, where a jury verdict in a case is not tainted by the alleged fraud, the verdict will remain in force. *Conerly* v. *Flower*, 410 F.2d 941 at 945 (8th Cir. 1969). *See also H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976); *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 at 717 (10th Cir. 1972); *United States* v. *Rexach*, 41 F.R.D. 180 (D.P.R. 1966).

The law is clear, therefore, that in order for "fraud upon the court" to be found, there must be "an unconscionable plan or scheme" aimed at "defiling the court itself" which affects the judicial and decision-making process.

B. The Burden of Proof for Showing Fraud Upon the Court Is Clear and Convincing Evidence.

Neither the plaintiff crew members nor the defendant Standard Precision set forth their charges of fraud with particularity, submitted evidence in support of such charges, or moved pursuant to Rule 60(b) to set aside the verdict.

Rather, it was the District Court which acted *sua sponte,* concluding:

> "Accordingly, the complaints of the plaintiff crew members and plaintiff IAI [Israel Aircraft] are dismissed in their entirety by the court *sua sponte.*" (Add. p. A17; App. p. 225a).

As discussed below, the District Court's finding of fraud was not based upon evidence adduced in the proceedings below or reasonable inferences from such evidence. The District Court's findings were based wholly on speculation and conjecture.

The District Court *speculated* that because Israel Aircraft knew about the releases, it understood their relevance to the proceedings below. The District Court further *speculated* that because Condon & Forsyth understood the relevance of the releases when they were interposed as a defense after trial, Condon & Forsyth knew of their existence from the beginning of the litigation.

Both speculations are contrary to the evidentiary record below. However, the Court combined these speculations to conclude that:

> "It is apparent that IAI [Israel Aircraft] withheld the information that the crew members had signed releases

> in the hope that the crew members might be awarded a large verdict from which IAI could recover the amounts it had paid the crew members pursuant to the releases. . . . Such action on IAI's part is clearly fraud on the Court." (Add. p. A16; App. p. 224a).

The law is clear that a finding of fraud cannot be based on conjecture and speculation. *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 at 717 (10th Cir. 1972); *Hawkins* v. *Lindsley*, 327 F.2d 356 at 359 (2d Cir. 1964); *Parker* v. *Checker Taxi Co.*, 238 F.2d 241 at 244 (7th Cir. 1956), *cert. denied*, 353 U.S. 922 (1957); *Armour and Co.* v. *Nard*, 56 F.R.D. 610 at 612 (N.D. Iowa 1972); *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 at 38-39 (S.D.N.Y. 1960).

On the contrary, fraud must be established by clear and convincing evidence. *Nederlandsche Handel-Maatschappij, N.V.* v. *Jay Emm, Inc.*, 301 F.2d 114 at 115 (2d Cir. 1962); *England* v. *Doyle*, 281 F.2d 304 at 309-10 (9th Cir. 1960); *Assmann* v. *Fleming*, 159 F.2d 332 at 336 (8th Cir. 1947); *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 53 F.R.D. 387 at 390 (S.D.N.Y. 1971), *aff'd*, 459 F.2d 1072 (2d Cir. 1972).

There is no such evidence in the record on this appeal. Rather the clear and convincing and indeed undisputed evidence here is that no fraud was committed.

C. The Evidence in the Record Shows That Israel Aircraft and Its Attorneys Did Not Deliberately Withhold the Releases and Commit a Fraud Upon the Court.

In the original decision of the District Court, dated October 26, 1976 (Add. p. A2; App. p. 209a), the District Court found fraud on the part of Israel Aircraft and its attorneys Condon & Forsyth without a hearing. None of the parties were given the opportunity to adduce evidence on the issue of fraud. This was clearly a denial of due process.

In *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575 (1946), the Court said:

> "No doubt, if the Court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties . . . [cites]. But, obviously, a court cannot deprive a successful party of his judgment without a proper hearing."

328 U.S. at 580. *See Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir., 1974); *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072 (2d Cir. 1972); *Conerly* v. *Flower*, 410 F.2d 941 (8th Cir. 1969); *Parker* v. *Checker Taxi Co.*, 238 F.2d 241 (7th Cir. 1956).

After the Court's original opinion the parties, on Motions for Reargument and Reconsideration, introduced direct evidence in the form of affidavits, transcripts, and exhibits. The District Court in its second opinion, however, did not treat the new evidence as part of a full factual record that must be weighed to see whether there is "clear and convincing evidence" of fraud. Rather the Court below shifted to the plaintiffs the burden of proving that they did not perpetrate a fraud on the Court. In the Court's view, the test was whether the plaintiffs could present:

> "evidence that causes me (the district judge) to question the correctness of my earlier opinion in this case." (Add. p. A27; App. p. 346a).

In reviewing Israel Aircraft's new evidence on the basis of this shifted burden of proof, the District Court concluded:

> "The bulk of the evidence presented to the court is meant to show that the failure of both IAI and the crew members to reveal the existence of the releases to the defendants or to the court until after the jury had reached a verdict on damages was excusable, since

> none of the plaintiffs or their attorneys knew that the releases existed and/or were relevant to this case until that time (more than three years after this case was commenced). Frankly, I find this too incredible to believe." (Add. p. A27; App. p. 346a).

In its second opinion, the District Court attempted to justify the lack of a developed record on the issue of fraud by saying that all of the "evidence" upon which it relied was adduced by the plaintiffs. He held that plaintiffs should not be heard to complain that this "evidence" was misleading or wrong.

The "evidence" he principally relied upon was one fact (that the releases were in existence throughout the litigation and not disclosed until after trial) and three statements found in documents in the record: answers to the pre-litigation questionnaire; Mr. Schierberl's statement regarding the production of "personnel records" of the crew at the third document marking session; and the transcript of Muscatel's answers at his deposition.

To this "evidence", the District Court gave its own interpretation, drew totally unjustified inferences of fraud, and refused to consider as credible direct evidence to the contrary submitted by Israel Aircraft on its Motion for Reconsideration.

The "evidence" the District Court explicitly relied on in his original opinion was characterized in the following way:

> "[1] IAI's [Israel Aircraft's] failure to produce the releases, [2] Schierberl's *false* assurances to defendants that the entire crew members' files would be forwarded, [3] Muscatel and Landau's *false* answers to written questions and, [4] Muscatel's *misleading* response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the de-

> fendants, court and jury of information having an important bearing on the dispute." (emphasis supplied) (Add. p. A17; App. p. 225a).

None of these four pieces of "evidence" support the District Court's finding of fraud.

[1] *Israel Aircraft's failure to produce the releases:*

There is no question that the releases were in existence in the possession of Israel Aircraft from the time of the commencement of the lawsuit. The question is, however, whether they were intentionally and fraudulently "withheld" by Israel Aircraft and its attorneys, Condon & Forsyth.

There is no evidence in the record that the releases were intentionally and fraudulently withheld. The evidence is: that Israel Aircraft's attorneys, who would have understood the possible relevance of the releases, never knew of their existence; and that Israel Aircraft knew of the lawsuit and the releases but did not believe that the releases were relevant in any way to the litigation between the crew members and Standard Precision. Finally, Israel Aircraft was never asked by any counsel in this litigation for any releases or other documents relating to the payments Israel Aircraft made to the crew.

This is understandable since all counsel involved in the litigation assumed that these payments were in the nature of workmen's compensation payments because of the employer-employee relationship and the small amounts involved. However, this assumption proved to be erroneous because under Israeli law, unlike the law of American jurisdictions, employees may bring direct actions against employers.

For various reasons therefore, including a lack of knowledge, failure of communication between counsel and client, incorrect assumptions, and reliance on Court orders (See pp. 36-37 *infra*), the releases were not produced until after

the jury verdict. However, none of these reasons constitute a fraudulent intent required by Rule 60(b).

At worst, the individuals were acting on incorrect assumptions, similar to the incorrect assumptions involved in *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072 (2d Cir. 1972).

In *Kupferman,* counsel instituted an action arguably barred by a formal release. The attorney learned of the release after the action was started, but did not disclose it in light of some uncertainty as to its exact meaning. Nor did he disclose it before the conclusion of trial, even though the nature of his opponent's defense gave him reason to conclude his opponent did not have the release. The Court nevertheless held that the non-disclosure did not amount to fraud, concluding:

> "[I]t is all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight—specifically our knowledge of [defendant's counsel] ignorance of the release and of the contents of the February 3 letter. [Plaintiff's counsel] had to make his decision without benefit of such knowledge."

459 F.2d at 1080.

[2] *Mr. Schierberl's "false assurances" to defendants.*[9]

Mr. Schierberl's statement that the personnel records would be provided was not evidence of fraudulent intent. Indeed, Mr. Schierberl never knew that the releases existed until after the jury verdict, and did not learn that the releases were contained in the personnel files until after the District Court's original opinion. There is, of course, no evidence that at the time he made the statement, or at any time prior to the representation of the crew members by Fuchsberg & Fuchsberg, that he did not intend to provide the personnel records.

The course of proceedings reveals that this request was supplanted in the give and take of informal discovery

[9] After several adjournments, requested by defendants, document marking sessions took place on July 18, 1973, August 29,

procedures.[10] The focus of the request for the personnel records was upon the production of the hospital records of the crew.[11] Upon the replacement of Condon & Forsyth by Fuchsberg & Fuchsberg in July 1974, the responsibility for the discovery and production of documents with regard to the crew members and their claims shifted to the new counsel for the crew. In fact, when Standard Precision subsequently moved to dismiss *inter alia* for failure to produce the personnel records, Condon & Forsyth in opposition papers filed stated that they believed that the personnel records had been or were in the process of being transmitted by Fuchsberg & Fuchsberg, the crew members' personal counsel. That they would or should be produced by the crew or the crew's new counsel was never questioned or challenged, and the District Court entered an order denying Standard Precision's Motion to Dismiss.

1973 and January 10, 1974 (Record Nos. 101, 102, 103). At the third session numerous documents relating to the aircraft were provided by both sides. The following colloquy took place at the end of the session:

> "MR. FITZSIMONS [Defense Counsel]: Do you have anything at all to produce with respect to Item No. 11 calling for the personnel records of the individual plaintiffs?
>
> MR. SCHIERBERL [Plaintiffs' Counsel]: Not at this time. We are obtaining those records and as soon as we have them I will give them to you" (App. p. 350a).

[10] This informal procedure is evidenced by the offer contained in the letter of May 13, 1974 from Condon & Forsyth to Mendes & Mount:

> "Further, if there are any other items which we have not yet provided, kindly inform us and we shall endeavour to accommodate you." (App. p. 293a).

The record reveals that every request made between January 10, 1974, the time that Schierberl's statement was made and the time substitution of counsel occurred on or about July 16, 1974, was honored.

This manner of informal discovery is consistent with the 1970 Advisory Committee Notes relating to extra-judicial production of documents. 48 F.R.D. 487 at 527.

[11] On July 2, 1974, Mr. Murphy, counsel for Standard, made a handwritten request stating:

> "Request authorization to obtain Medical Records of Plaintiffs." (App. p. 135a).

[3] *Muscatel and Landau's false answers to written questions.*[12]

Although the court referred to these questions as "answers to [Standard's] interrogatories" (Add. p. A8; App. p. 216a), they were in fact an informal pre-litigation questionnaire of Condon & Forsyth which was made through their London counsel and was answered by the crew with the aid of Israel Aircraft's insurance officer. These questions and answers were transmitted to Fuchsberg & Fuchsberg, the crew attorneys, at the time they replaced Condon & Forsyth as counsel for the crew and were provided to Standard Precision's attorneys prior to the depositions of the crew.

This questionnaire which was essentially the attorney's work product of Condon & Forsyth was designed to secure information in connection with prospective litigation to be commenced by Condon & Forsyth on behalf of the crew. Neither at the time they were made, nor at the time they were disclosed to other counsel prior to the depositions of the crew, were they intended to mislead and there is no evidence to support such a conclusion.

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[12] Among the questions asked and the answers given by Landau, were the following:

"11. Details of any injury insurance payments under the State scheme (interim and final payments).

[A.] 11. Interim payment (temporary disability—IL 2068.75). Permanent disability—pension of IL 361.20 per month.

12. Details of any injury payments made by IAI [Israel Aircraft].

[A.] 12. Injury payment and reparation for the loss of future income of the amount of IL 75,000 were made by IAI.

13. Whether or not any of the above-mentioned payments are taken into account and deducted from damages under Israeli law.

[A.] 13. The capitalized value of the pension is taken into account under Israeli law. The payment made by IAI is not a subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds." (App. p. 329a).

Similar answers were given by Muscatel and Koren (App. p. 329a).

[4] *Muscatel's "misleading" response at his deposition*[13]

Since Condon & Forsyth no longer represented Muscatel, there is therefore no basis for holding Israel Aircraft accountable for his statements. In any event, Muscatel's statements are consistent with the Israeli view of the direct payments made by Israel Aircraft to the crew—as *ex gratia* because they were not based on legal liability.

The four pieces of "evidence" relied upon by the Court do not constitute clear and convincing evidence that Israel Aircraft and its attorneys deliberately withheld the releases from the parties and the court, thereby perpetrating a fraud upon the court.

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[13] The following questions and answers took place between defendants' attorneys and the witness Muscatel:

DEFENDANTS' COUNSEL, MR. MURPHY:

"Q. Is there an agreement with your employer, I.A.I. that you must pay them back money they have paid you if you receive money in this lawsuit?

A. Yes.

Q. Can you tell me how much money you received in benefits or pensions as a result of these injuries up to the present time?

A. Yes, I've got 10,000 pounds.

Q. Was that a single payment from your employer?

A. Single time. Once.

Q. Do you now receive any pensions from either the government or your employer as a result of these injuries?

A. Not right now, but I did get, because of my temporary invalidity. (App. p. 353a)

Thereafter, Mr. Cousins of Fuchsberg & Fuchsberg asked the following questions on this subject:

MR. COUSINS:

"Q. Can you tell us what the 10,000 pounds lump sum payment you received from I.A.I. represented?

A. I think there was an agreement between me and I.A.I. to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that.

Was this money paid to you as a result of your injuries sustained in this accident?

A. Yes." (App. p. 354a)

[5] *Other evidence in the record, including absence of motive, was apparently not considered by the District Court.*

(a) Uncontradicted affidavit evidence.

Lengthy affidavits were submitted by Israel Aircraft and its attorneys denying any wrongful intent or misconduct. These affidavits were unequivocal and uncontradicted. The District Court gave these affidavits no weight but in fact stated with respect to the statements of the affiants:

> "Frankly, I find this too incredible to believe." (Add. p. A27; App. p. 346a).

(b) Disclosure of the payments.

The District Court failed to consider other evidence in the record which negates any fraudulent intent on the part of Israel Aircraft and its attorneys Condon & Forsyth.

The first fact evidencing a lack of intent to conceal the releases is the early disclosure of the payments for which the releases were a *quid pro quo*. These payments were disclosed by the crew and Israel Aircraft to their counsel before the litigation was commenced and to all parties prior to the deposition of the crew. All counsel had knowledge of these payments but because of the relatively small amount and the fact that they were paid by Israel Aircraft, all counsel assumed them to be a form of workmen's compensation. The crew's answers to the inquiries posed by their own counsel, and subsequently at depositions, seemed, and were accepted as consistent with this prevailing belief.

Both counsel for plaintiffs and defendants should have inquired more deeply into the nature of the payments, their background, and whether or not there were any documents recording or relating to those payments. Because of the incorrect assumption regarding the payments, no counsel did so. However, the disclosure of the payments by Israel Aircraft supports a lack of intent to conceal.

(c) Condon & Forsyth's conduct upon learning about the possible existence of releases.

The sequence of events and the actions of both Israel Aircraft and its counsel, Condon & Forsyth, negate both a fraudulent intent and a unconscionable scheme to defraud the Court.

First, Condon & Forsyth after hearing from Mr. Cousins of the possible existence of documents which might affect the crews' recovery, immediately sent a telex on January 31, 1976 to Israel Aircraft inquiring as to whether any such documents existed. (App. p. 232a).

Second, on February 4, Condon & Forsyth received from Israel Aircraft a telex translation of a Hebrew document which appeared to be a release. (App. p. 234a).

Third, Condon & Forsyth retained an Israeli attorney and requested a legal opinion from its Israeli counsel regarding the release. (App. p. 228a).

Fourth, Mr. Schierberl went to Israel to examine the releases in March 1976 and to determine the circumstances relating to their execution. (App. p. 228a).

Fifth, as soon as Mr. Schierberl examined the releases and determined their possible relevance to this litigation, he called Mr. Murphy, counsel for defendant, from Israel and informed him of the releases. (App. p. 230a).

Sixth, Israel Aircraft then filed its Motion to Dismiss the counterclaims raising the releases as a defense and attaching the releases. (App. p. 183a).

These facts are established by sworn affidavit testimony and uncontradicted. This evidence was submitted after the original opinion of the District Court. Nevertheless, the District Court adhered to its prior holding that:

> "It is also relevant to the issue of IAI's fraud on the Court that shortly after the verdict, IAI's attorneys demanded of the individual crew members that pursuant to the releases they reduce the amount of their claims by 65%, the amount by which IAI would be obligated

> to reimburse SP. This demand occurred despite IAI's arguments that its New York counsel did not understand the import of the releases. Clearly this is an indication that New York counsel entirely understood the import of the releases, and merely waited until after a verdict had been handed down to reveal the releases' existence." (footnote deleted) (Add. p. A16; App. p. 224a).

This holding is contrary to the evidence and to human experience—that someone who had fraudulently concealed relevant documents would so openly and freely disclose them.

(d) The Motive of Disclosing the Releases.

The District Court found that Israel Aircraft did not disclose the releases because it hoped to recoup the amounts it paid to the crew.

The District Court stated that Israel Aircraft

> "withheld the information that the crew members had signed releases in the hope that the crew members might be awarded a large verdict from which IAI could recover the amounts it had paid the crew members pursuant to the releases. . . . Such action on IAI's part is clearly fraud on the Court." (Add. p. A16; App. p. 224a).

This Israel Aircraft has denied emphatically under oath. (App. p. 298a).

In Israel Aircraft's subrogation action, Israel Aircraft had no pecuniary interest at stake. The London-based insurers would be the only beneficiary of any recovery of the subrogation property damage action.

Thus Israel Aircraft had nothing to gain in either disclosing or not disclosing the releases.

Further, the total amount Israel Aircraft could hope to gain was the $11,000 they paid to the crew. However, it cannot be seriously suggested that a multi-million dollar

business would risk its reputation in order to obtain $11,000.

D. *De Novo* Review Is Appropriate, Because the Court's Opinion Is Based Solely on Documentary Evidence.

The finding of fraud by the District Court was based on a single fact (the fact that the releases were in existence throughout the litigation and not disclosed) and three statements contained in documents or transcripts before the Court (the Schierberl statement, the pre-litigation questionnaire, and transcript of answers of Muscatel given at his deposition). The District Court ignored affidavits and other written evidence to the contrary. Since all of the evidence on the issue at bar is written evidence, not oral testimony where demeanor is a factor, this Court can and should completely review *de novo* this finding of fraud. *E.g., San Filippo* v. *United Brotherhood of Carpenters & Joiners of America*, 525 F.2d 508 (2d Cir. 1975); *United States ex rel. Lasky* v. *LaVallee*, 472 F.2d 960 at 963 (2d Cir. 1973); *Orvis* v. *Higgins*, 180 F.2d 537 at 539 (2d Cir. 1950).

The Court of Appeals is not limited to the District Court's factual findings. The "clearly erroneous" standard of review is inapplicable to the findings of fact by the District Court in the case below. *Dopp* v. *Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972). This Court is completely free to draw different inferences of fact and reach contrary results on this appeal considering the four pieces of "evidence" relied upon by the District Court for its finding of fraud and the other written evidence in the record. *See* p. 25 *supra*, *Severi* v. *Seneca Coal & Iron Corp.*, 381 F.2d 482 (2d Cir. 1967).

E. Conclusion.

The evidence before this Court establishes that there was no fraud on the part of Israel Aircraft and its attorneys. Certainly, on this record this Court must find that the conclusion of the Court below that Israel Aircraft and its attorneys fraudulently withheld the releases and committed a fraud upon the Court was not established by clear and convincing evidence.

POINT II

The District Court Erred in Dismissing the Complaint of Israel Aircraft Under Rule 37 of the Federal Rules.

The District Court dismissed plaintiff Israel Aircraft's complaint pursuant to Rule 37 after a jury verdict in favor of Israel Aircraft for the reason that Israel Aircraft failed to produce the releases in response to defendant's document request No. 11. (Add. pp. A12, A22 n.2; App. pp. 219a, 341a n.2).

Under appropriate extreme circumstances, Federal Rules 37(b) and (d) allow a Court to dismiss a plaintiff's claims for deliberate failure to comply with discovery rules. Rule 37(b)(2)(c) provides that on failure to comply with an order of discovery, the Court may enter an order "dismissing the action" and Rule 37(d) makes such relief available on a complete failure to respond to discovery demands.

Nevertheless, the Court is cautioned by Rule 37(b)(2) to make only those orders "as are just". *See, e.g., Gill* v. *Stolow*, 240 F.2d 669 at 670 (2d Cir. 1957) ("In final analysis, a Court has the responsibility to do justice"); *Williams v. Krieger*, 61 F.R.D. 142 at 145 (S.D.N.Y. 1973) ("severity of the sanctions should be tempered by a consideration of the equities"); 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2234, at 768 (1975). Accordingly, as the Court said in *Independent Productions Corp.* v. *Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960): "The dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies, and should be applied only in extreme circumstances." 283 F.2d at 733. *See also, e.g., Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197 at 212 (1958); *Flaks* v. *Koegel*, 504 F.2d 702 at 708 (2d Cir. 1974).

A. The District Court Erred in Dismissing Israel Aircraft's Complaint Absent a Violation of a Court Order.

When the District Court invoked Rule 37 and imposed the sanction of dismissal, no Order had been entered com-

pelling production, or compelling answers to interrogatories, or questions asked at deposition. Fed. R. Civ. P. 37(b).

"Rule 37(b) [allowing dismissal] has no application", as Wright and Miller point out, *supra* at p. 790, "if there has not been a court order". *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989 at 994 (8th Cir. 1975). The sanction of dismissal is authorized under Rule 37(b) *only* where there is an outstanding court order compelling discovery which is not complied with. *Britt* v. *Corporacion Peruana de Vapores*, 506 F.2d 927 (5th Cir. 1975); *United States* v. *Mensik*, 381 F. Supp. 672 at 680 (N.D. Ill. 1974); *Wembley, Inc.* v. *Diplomat Tie Co.*, 216 F. Supp. 565 at 573 (D. Md. 1963); 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2282. As stated in the Advisory Committee Notes to Rule 37(b): "This subdivision deals with sanctions for failure to comply with a court order." ADVISORY COMMITTEE NOTES, Fed. R. Civ. P. 37(b), 28 U.S.C.A.

Thus, the District Court was without power to proceed directly against Israel Aircraft pursuant to Rule 37(b) since there was no Rule 37(a)(3) order entered against Israel Aircraft.

The drafters of the rules intended that the requirement of an order upon which sanctions may be imposed would be a safeguard for litigants against the serious consequences of Rule 37(b) sanctions, providing them with notice and a second opportunity to comply with a discovery demand. *See, e.g., Williams* v. *Krieger*, 61 F.R.D. 142 (S.D. N.Y. 1973); *Allied Artists Pictures Corp.* v. *Giroux*, 50 F.R.D. 151 (S.D.N.Y. 1970); *Gill* v. *Stolow, supra.*

This second opportunity to correct is consistent with the purpose of Rule 37 which is not to punish, but to discover evidence. As the Court, in *Robison* v. *Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966), stated:

> "After all, the purpose of the discovery rules is to produce evidence for the speedy determination of the

> trial. The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties."

368 F.2d at 39. *See Linnear* v. *White*, 422 F.2d 864 at 865 (7th Cir. 1970).

> "The rule is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions. The court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior."

Dorsey v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 at 860 (5th Cir. 1970).

This absence of a second opportunity to comply in the form of an order compelling the production of the "personnel records" of the crew (which unknown to counsel for Israel Aircraft contained the releases) precludes the sanction of dismissal under Federal Rule 37(b). The District Court seemed to acknowledge this when it stressed that it was dismissing because of special "circumstances" "even though there was no violation of a specific court order to disclose particular information". (Add. p. A13; App. p. 220a).

Not only did the Court err in dismissing without an underlying court order, the Court erred as well in the "circumstances" it relied upon. The Court mistakenly thought the special circumstances were:

> "Defendants had no way of knowing what information and documents were being withheld, and thus could not have made the appropriate Rule 37 motion normally a prerequisite to court sanction under that rule. Moreover, to a large degree it was the misleading and inaccurate statements by plaintiffs that kept defendants from making any such motion." (Add. p. A12; App. p. 220a).

Yet, it is undisputed that defendants did in fact make a motion to dismiss for failure to produce the personnel records which *the District Court denied.*

B. The District Court Erred in Dismissing Israel Aircraft's Complaint Absent a Complete Failure to Respond to Discovery.

Apart from violation of a court order, a court can dismiss under Rule 37(d) only when there has been a "complete failure to respond to a notice of deposition, interrogatories, or a request for inspection. . ." 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2282 at 757. *See also, e.g., Robison* v. *Transamerica Insurance Co.*, 368 F.2d 37 at 49 (10th Cir. 1966).

If the party "serves a response, but in it he fails to say that inspection will be permitted as requested or he fails to permit the inspection itself a motion under Rule 37(a) to compel inspection is available". In such case, the sanction of dismissal is inappropriate. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §2291 at 810.

None of the acts justifying the exercise of the power to dismiss under Rule 37(d) were present in this case. On the contrary, when defendants moved to dismiss *inter alia* Israel Aircraft's Complaint for failure to produce the personnel records, Condon & Forsyth, who had been replaced by Fuchsberg & Fuchsberg as counsel for the crew and who had no knowledge that the releases were in the personnel records, opposed the motion. The grounds for the opposition by Condon & Forsyth were in part that, on information and belief, the personnel records had been transmitted or were in the process of being transmitted by the crews' counsel, Fuchsberg & Fuchsberg. Condon & Forsyth's response was served on Fuchsberg & Fuchsberg and counsel for defendants and was not questioned or challenged. The Court thereafter *denied* the motion.

The disposition of this motion, which was essentially a motion for sanctions for failure of discovery, clearly shows by Court Order denying the motion, that there was not a complete failure to respond justifying dismissal under Rule 37.

C. The Settled Law of the Second Circuit Requires a Showing of Willfulness and a Cautious Use of the Dismissed Power.

Even if an order were outstanding, or there was a total failure to respond, dismissal is not permitted under Rule 37 absent a "wilful" failure to comply with discovery. *E.g., SEC* v. *Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975); *Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974); *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970); *Gill* v. *Stolow*, 240 F.2d 669 at 670 (2d Cir. 1957).

As the Court held in *Flaks* v. *Koegel, supra* at 708:

> "The argument that *willful* refusal to obey an order to respond to interrogatories or to appear for a deposition is not a necessary prerequisite to the imposition of any sanction under Rule 37 is premised on the position that the 1970 amendments to Rule 37 eliminated from the Rule the term "willful," which had previously been employed to characterize the conduct which would trigger the sanctions of the Rule. We do not accept this argument. The 1970 amendments were intended to authorize the court, where it deemed appropriate, to impose more flexible and softer sanctions for Rule 37 violations than theretofore provided. However, there was no intent to eliminate the willfulness element when the harsh sanction of the dismissal of a complaint or the striking of an answer was ordered." (footnote deleted).

In *Flaks* v. *Koegel*, for example, the Court reversed the lower court's dismissal of the defenses of a defendant who had indisputedly refused to appear at depositions, answer interrogatories, cooperate with his counsel, appear before a Magistrate or comply with letters written directly by the Court—"the record before the judge was one of seeming callousness and intransigence . . . and judicial patience and forbearance were understandably exhausted"—because there was no hearing on "willfulness."

Here, all the evidence pointed in the same direction: there was at worst an innocent failure to produce the releases. Indeed, the District Court here did not even make a finding or consider willfulness, but instead simply concluded:

> "IAI should have turned the releases over to defendants pursuant to SP's [Standard Precision's] discovery request for the personnel records of the crew members." (Add. p. A25; App. p. 344a. *See also* Add. p. A12; App. p. 219a).

A dismissal based on this conclusion is contrary to the standard set out by this Court in *SEC* v. *Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975):

> "Recognizing the severity of the sanction of a judgment granting affirmative relief by default, we have held that, notwithstanding the elimination of the term "willful" from Rule 37 as a result of the 1970 amendments, the sanction should not be imposed because of negligence, and that the plaintiff must demonstrate that the defendant's failure to comply is due to willfulness, bad faith or fault and not to an inability to comply."

521 F.2d at 588.

Since there was no finding of willfulness by the Court below nor is there any evidence of willfulness in the record, the sanction of dismissal was beyond the power of the District Court.

D. The District Court Erred in Assuming That Israel Aircraft and Its Attorneys Had the Same Factual Knowledge.

The District Court in its Opinion of January 4, 1977 concluded that it made no difference that Israel Aircraft did not realize that the personnel records or releases were requested or needed:

> "I shall not detail IAI's attempt to prove that it was unaware of the relevance of the releases to the litiga-

tion; but in essence IAI argues that the real party in interest in this litigation was its insurer, and that IAI had limited contact with Condon and Forsyth, its attorneys of record, who were retained by the insurer. I find this excuse to be totally void of merit. As the party of record, IAI is responsible for actions taken on its behalf. A party cannot prosecute its claim through its attorneys of record, and then later attempt to isolate itself from adverse results that may occur on the ground that it had no contact with those attorneys." (Add. p. A24 n.4; App. p. 343a n.4).

* * *

"It is clear to me that these assertions [by Israel Aircraft of lack of knowledge of relevance of the releases or requests for production of the personnel records] do not undercut the legal or factual basis of my decision." (Add. p. A25, App. p. 344a).

* * *

". . . IAI may not excuse itself for the failure to produce these releases on the ground that it did not understand the nature of the litigation—IAI was a named party in the litigation, and was represented by counsel who clearly understood what defendants were requesting. Futhermore, it is no excuse that IAI's attorneys, Condon & Forsyth, claim they did not know that any releases had ever been signed, since their client, a party to the releases, certainly knew of their existence. Given the obvious materiality of the releases to this litigation, IAI's failure to produce them warrants the extreme sanctions that I imposed." (Add. p. A26; App. p. 345a).

The Court's first error was in its conclusion—notwithstanding the sworn testimony of Condon & Forsyth to the contrary—that Israel Aircraft's counsel knew the releases existed and knew that they were in the personnel records.

The Court's next error was to treat Israel Aircraft and its counsel as one, attributing the factual knowledge of each to the other. This is contrary to the uniform treat-

ment courts have always given to the fact that a client is separate and distinct from its counsel, particularly for purposes of determining whether Rule 37 sanctions should be imposed. For example, in *Flaks* v. *Koegel, supra,* the Court scrupulously distinguished between the client and its counsel. There the Court noted that a "strained relationship" existed between counsel and client and there was "a failing of cooperation between the two"; that as a result the client did not become aware of the Court's orders requiring answers to interrogatories, or learn of the dates it was supposed to appear for depositions. Indeed, the Court there held that:

> "The affidavits then before the court depicted Koegel as a victim of the neglect of disaffected counsel, unaware of the crucial orders we have recounted, ready and able to comply and also seeking an evidentiary hearing to establish his bona fides. If counsel rather than the client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion."

504 F.2d at 712.

The holding in *Flaks, supra,* is directly contrary to the holding of the Court below and is consistent with the uniform position taken by other courts. *E.g., Woodham* v. *American Cystoscope Co. of Pelham, N.Y.*, 335 F.2d 551 (5th Cir. 1964); *Stephens* v. *Sioux City and New Orleans Barge Lines, Inc.*, 30 F.R.D. 397 (W.D. Mo. 1962); *Austin Theatre, Inc.* v. *Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958); *United Sheeplined Clothing Co.* v. *Arctic Fur Cap Corp.*, 165 F. Supp. 193 (S.D.N.Y. 1958); *Maresco* v. *Lambert,* 2 F.R.D. 163 (E.D. N.Y. 1941).

While these cases deal with failure on the part of the attorneys alone, the facts of this case are even more compelling. Here, in order to establish any basis for a finding of fraud or willfulness, the knowledge of both parties

would have to conjoin to give rise to an obligation to produce the releases.

The record in this case shows that Israel Aircraft did not believe and was not aware that the releases were relevant to this litigation between the crew and Standard Precision and that Condon & Forsyth, who would have understood the relevance of the releases, did not know of their existence.

E. The Cases Relied Upon by the District Court in Dismissing the Complaint Under Rule 37 Did Not Support the Imposition of That Sanction in This Case.

In an effort to provide authority for its action, the Court invoked *Marshall* v. *Ford Motor Co.*, 466 F.2d 712 (10th Cir. 1971) and *B. F. Goodrich Tire Co.* v. *Lyster*, 328 F.2d 411 (5th Cir. 1964). Neither case provides the slightest basis for the Court's dismissal. On the contrary, in *Marshall* the Court actually declined to dismiss under Rule 37 for claimed failures of defendant to respond to discovery. This case stands, therefore, for judicial restraint. It does not hold that the Court can impose drastic sanctions such as a dismissal without a violation of a discovery order entered by the Court.

The requirement of an outstanding order for a Rule 37 sanction is also supported in the second case relied upon by the District Court, *B. F. Goodrich Tire Co.* v. *Lyster, supra*. In that case the Court recognized that Rule 37 required an outstanding discovery order, not complied with, before sanctions can be imposed. Choosing not to rely on that ground in denying the relief sought, the Court in *B. F. Goodrich* found that the defendants' attorney's improvident agreement there involved was made in good faith but in ignorance of essential facts and did not justify such sanction.

Neither *Marshall nor B. F. Goodrich* support the action of the District Court in dismissing the Complaint in this case under Rule 37.

F. The District Court Deprived Israel Aircraft of an Opportunity to be Heard.

In any event, if there were any question in the District Court's mind regarding a failure to respond to discovery procedures, the due process clause of the United States Constitution obligated the Court to give Israel Aircraft an opportunity to be fully heard, by full documented evidence or a hearing. *See, e.g., Societe Internationale Pour Participations Industrielles* v. *Rogers,* 357 U.S. 197 (1958); *Universal Oil Products Co.* v. *Root Refining Co.,* 328 U.S. 575 (1946); *Hovey* v. *Elliott,* 167 U.S. 409 (1897); *Flaks* v. *Koegel, supra.* As the Court held in *Societe Internationale Pour Participations Industrielles* v. *Rogers:*

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 US 409, 42 L ed 215, 17 S Ct 841, and Hammond Packing Co. v. Arkansas, 212 US 322, 53 L ed 530, 29 S Ct 370, 15 Ann Cas 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 USC (1952 ed.), p. 4325."

357 U.S. at 209.

Indeed, failure to provide a party with an opportunity to be heard also violates the Seventh Amendment right to a jury trial. *See, e.g., Conerly* v. *Flower,* 410 F.2d 941 at 944 (8th Cir. 1969).

The District Court, in its January 4, 1977 Opinion, stated that it agreed "with the general proposition that a judg-

ment should normally be vacated only after a hearing has been held," (Add. p. A22; App. p. 341a) but concluded it was relieved of this Constitutional obligation:

> "As I have just indicated, however, the parties whose claims have been dismissed in this case, the plaintiffs, are also the parties who supplied the court with the information on which the dismissal was based. Had the defendants supplied the court with the facts upon which dismissal was ordered, *Flaks* apparently would have mandated a hearing; but here plaintiffs were not barred from controverting the contentions and allegations upon which the court decision was based. They supplied in toto the foundations for the decision. It is, therefore, ludicrous for plaintiffs to contend that their due process rights were denied because in reaching its conclusion the court accepted the facts they supplied without giving them an opportunity to supply those facts in another form." (Add. p. A23; App. p. 342a).

Israel Aircraft did not have the opportunity to be heard prior to the October 26, 1976 decision. The Court acted *sua sponte*, and his finding of fraud and the imposition of the sanction of dismissal was violative of due process. Further, on Israel Aircraft's Motion for Reargument the District Court failed to give due consideration to the uncontradicted evidence showing that there was a complete absence of fraud, bad faith or misconduct of any kind.

The Court drew inferences from conjecture, based its decision on nothing more and, faced with uncontradicted evidence to the contrary, chose to ignore it as "too incredible to believe." (Add. p. A27; App. p. 346a).

G. Conclusion

It is clear that, absent an order not complied with or a total failure to respond to discovery demands and willfulness, the District Court erred in imposing the extreme sanction of dismissing Israel Aircraft's complaint under the facts of the case.

POINT III

The District Court Erred in Imposing Sanctions While Refusing to Determine Materiality of Any Alleged Misconduct.

A condition precedent to the imposition of sanctions under Federal Rules 37 and 60 is a determination whether the alleged misconduct had any material impact on the lawsuit. Under Rule 37, for example, the Court in *Dunbar* v. *United States*, 502 F.2d 506 (5th Cir. 1974) refused to impose sanctions because of a failure to respond to disputed interrogatories because:

> "While these questions might have interesting answers, they are not so germane to the conduct of the instant lawsuit that the plaintiff must answer them or face the sanctions of Rule 37."

502 F.2d at 510. (footnote deleted).

See also, e.g., Flaks v. *Koegel*, 504 F.2d 702 (2d Cir. 1974).

Similarly, under Rule 60 before a judgment or decree may be properly set aside, "it must appear that the fraud charged really prevented" the party complaining from fully and fairly presenting its side of the case. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 at 421 (1923). *See, Keys* v. *Dunbar*, 405 F.2d 955 at 957-58 (9th Cir. 1969); *Seismograph Service Corp.* v. *Offshore Raydist, Inc.*, 263 F.2d 5 at 23 (5th Cir. 1958); *Atchison, Topeka and Santa Fe Ry.* v. *Barrett*, 246 F.2d 846 at 849 (9th Cir. 1957). Absent a showing that a fraud affected material facts in the action, no relief under Rule 60(b) is available. *See, e.g., England* v. *Doyle*, 281 F.2d 304 at 310 (9th Cir. 1960). One application of the materiality rule is the requirement that a complaining defendant establish that he has a meritorious defense to the underlying claim before relief under Rule 60(b) can be granted. *See Assmann* v. *Fleming*, 159 F.2d 332 at 336-37 (8th Cir. 1947).

Indeed, Courts always consider materiality in determining the nature of the sanctions to be imposed and in seeking wherever possible to impose a sanction less drastic than a dismissal. *Dunbar* v. *United States*, 502 F.2d 506 at 509-10 (5th Cir. 1974); *B. F. Goodrich Tire Co.* v. *Lyster*, 328 F.2d 411 at 415-19 (5th Cir. 1964); *Fisher* v. *Harris, Upham & Co.*, 61 F.R.D. 447 at 450-51 (S.D.N.Y. 1973).

The District Court here expressly refused to determine the materiality or even the relevancy of the releases to personal injury claims. Israel Aircraft, the crew, and defendants all had varying views as to the legal effect of the releases under Israeli law, ranging from a very limited effect offered by the crew and not affecting the lawsuit at all, to a very broad effect offered by defendants, releasing the whole world. These varying views were supported by expert opinion and lengthy discussions.

Nevertheless, the District Court considered it "too late" to determine the effect of the releases.

> "Had the releases been disclosed in a timely way, it would have been incumbent upon the court to determine their validity and effect under Israeli law." (Add. p. A10; App. p. 218a).

Indeed, the District Court emphasized that it reached no finding as to the effect of the releases:

> "There is the possibility that the releases are 'general' releases under Israeli law, as SP asserts, see October 26, 1976 Opinion at p. 6, but there has been no finding to that effect." (Add. p. A25 n.5; App. p. 344a n.5).

Nevertheless, the District Court felt free to rest its decision on the supposition that plaintiffs withheld "matters material to the fair disposition of the claims presented" (Add. p. A14; App. p. 222a), "withheld material information from the Court" (Add. p. A15; App. p. 223a) and to conclude:

> "Given the obvious materiality of the releases to this litigation, IAI's failure to produce them warrants the extreme sanctions that I imposed." (Add. p. A26; App. p. 345a).

But the Court could not know what sanctions might be warranted—let alone extreme sanctions—without first determining the effect of the releases. Indeed, as discussed below, it is undisputed that the releases did not relate and had no effect on the claims pertaining to Israel Aircraft's property damage claim. The Court thus erred in presuming materiality and—based on the presumed and unsupported conclusions of wrongdoing—erred in imposing the sanctions it did.

POINT IV

The District Court Erred in Setting Aside the Verdict in the Property Damage Claim Because the Misconduct Found by the District Court Did Not Affect This Verdict.

As demonstrated in Point I herein no fraud or other misconduct has been committed by either Israel Aircraft or Condon & Forsyth in this case. In any event, however, the District Court should not have set aside the verdict for Israel Aircraft on the property damage claim for the loss of the aircraft because the releases could have no effect on this claim.

As was mentioned in Points I and III, *supra*, one of the bases for providing relief from fraud on the court is that the party injured is deprived of a defense or claim which, but for the fraud, would have been valid. In *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972) the court said:

> "[A] showing must be made that the movant would have had a good claim or defense in the main action."

466 F.2d at 717.

In the same vein, the Court in *United States* v. *Rexach*, 41 F.R.D. 180 (D.P.R. 1966) said:

> "The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the Court of the subject matter of the suit."

41 F.R.D. at 185.

Thus, in a case where the fraud found had not affected the decision-making process of the jury, the district court refused to grant a new trial and instead simply reinstated the verdict. Stated the Court:

> "The jury verdict itself was not fraudulently obtained. The fraud did not prevent the jury from hearing all of the evidence. In addition, no complaint is made that either the instructions or the oral arguments were rendered erroneously. The only corruption of the judicial power was in inducing the Court not to enter the true verdict rendered."

Conerly v. *Flower*, 410 F.2d 941 at 945 (8th Cir. 1969).

In the case at bar, the Court below, in its first opinion, mistakenly comments:

> "Indeed, it is possible that the time spent on this case would have been drastically reduced had the existence of the releases been known. Certainly the jury verdict would have been affected by any knowledge that IAI had been given full release by the crew members in consideration for payment of a sum of money." (Add. p. A10; App. p. 218a).

The fact of the matter is that the trial would have occurred despite the releases. Israel Aircraft would have prosecuted its property damage claim and presented its

liability and damage cases. The above passage seems to suggest that had the releases been disclosed prior to trial, the litigation time would have been reduced and the jury verdict would have been affected. If the crew members' claims were barred by the releases, the time saved would consist only of *their* proof of damages (less than two days out of a total of 15 trial days). However, if their claims were barred the releases would have *no* effect on the jury's deliberation because the releases would have been irrelevant to the property damage claim of Israel Aircraft.

The District Court's basic error was in failing to understand that the disclosure of the releases after the jury verdict on liability had no effect on Israel Aircraft's property damage claim *or* verdict. As was the case in *Conerly* v. *Flower, supra,* the jury was not deprived of any relevant information with regard to the property damage claim. The jury was neither subjected to untrue or misleading arguments nor was it deprived of relevant arguments based on the releases as to Israel Aircraft's claim.

With regard to Israel Aircraft's property damage verdict, no rights of defendants were affected by the disclosure of the releases after trial.

The error in the District Court's sweeping action can best be viewed by separating the causes of action into separate units. Clearly, a district court would not set aside a judgment obtained by Israel Aircraft in a suit against Standard Precision for the property damage to the aircraft, merely because, in a parallel suit brought by the crew against Standard Precision, the releases were not disclosed. The court would have no power to set aside a verdict in another case because it found fraud in the case before it, where it could not be demonstrated that the fraud affected the other suit.

Therefore, where, as here, the alleged fraud does not affect, taint, or form the basis of the jury verdict obtained fairly and openly in an unhampered adversary proceeding, the verdict should not be set aside because, as to a

matter not relevant to this verdict, someone was found by the Court to have committed fraud. To ignore this practical distinction in this case is to hold that a court may punish a litigant for misconduct in the action before it by reaching out and taking away a jury verdict fairly obtained in another action. There is no legal basis for such power.

The verdict of Israel Aircraft against the defendants must therefore be reinstated.

CONCLUSION

The Orders appealed from should be reversed.

The cause should be remanded with instructions:

1. to reinstate the jury verdicts on liability and damages in favor of Israel Aircraft;

2. to determine the legal effect of the releases on the counterclaim asserted by Standard Precision against Israel Aircraft; and

3. for such further proceedings as are directed by this Court.

Respectfully submitted,

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ADDENDUM

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ISRAEL AIRCRAFT INDUSTRIES, et al.,

Plaintiffs,

—against—

STANDARD PRECISION, et al.,

Defendants.

APPEARANCES:

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Attorneys for Plaintiff IAI

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Attorneys for Plaintiffs Zohar Landau, Mordechai Muscatel, and Hagai Koren

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CARTER, *District Judge:*

OPINION

I

The Jury Verdict

This is an action for personal injuries and property damage sustained as the result of the crash of a jet airplane in Israel on January 21, 1970. Plaintiffs are Israel Aircraft Industries, Ltd., ("IAI") the owner of the aircraft, and the three crew members, Zohar Landau, Mordechai Muscatel, and Hagai Koren, ("Landau", "Muscatel" and "Koren") all of whom were injured when they bailed out of the jet.[1] Defendants are North American Rockwell Corporation ("Rockwell"), maker of the aircraft, and Standard Precision, a Division of Electronic Communications, Inc. ("SP"), manufacturer of the wing flap actuator, the part alleged to have failed causing the crash.

The complaint encompassed causes of action for negligence, breach of warranty, and strict products liability.[2] The defendants counterclaimed against IAI on the ground that modifications by IAI to the wing flap actuator caused the crash.

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[1] The wives of the three crew members originally were plaintiffs in the action, suing for loss of services incident to the injuries suffered by their husbands. When the court ruled at trial that Israeli law would apply to loss of service claims, these actions were dismissed because Israel does not recognize such a cause of action.

[2] Initially the action was brought on behalf of all plaintiffs except the Korens. An amended complaint was subsequently filed on behalf of all plaintiffs. Both complaints were signed by William L. Schierberl of the law firm Condon & Forsyth. Norman Leonard Cousins of Fuchsberg & Fuchsberg later took over the representation of the individual plaintiffs. Exactly when this change took place is not clear since Cousins never filed a motion to be substituted as counsel of record. Both defendants have been represented throughout by Dennis Murphy of Mendes & Mount.

After trial the jury prorated 65% of the responsibility for the crash against IAI, 35% against SP, and none against Rockwell. The jury also held Rockwell not liable to IAI for breach of warranty. It assessed total damages for the value of the lost aircraft at $860,000. SP's liability to IAI for damage to the lost aircraft was thus held to be $301,000. The jury also awarded damages to crew members for their injuries as follows: Landau—$275,000, Muscatel—$135,000, and Koren—$15,000. Because liability had been established at 65% IAI and 35% SP, when SP paid the crew members $425,000, the total amount assessed, it could then recover 65% of that amount, or $276,250, from IAI.

Post Trial Motions By IAI

IAI has now moved, pursuant to Rule 56(b), F.R.Civ.P., for judgment against SP on SP's counterclaim on the ground that long before trial IAI had compensated Landau, Muscatel, and Koren for their injuries in exchange for the execution of a release from liability by each crew member. IAI asserts that these payments, 75,000 Israeli pounds (IL) to Landau, IL 10,000 to Muscatel, and IL 5,000 to Koren, made in exchange for the releases, satisfy in full its liability to the crew members either directly or indirectly. If the crew members are allowed to recover the full amount of their jury verdict from SP, says IAI, they will be paid twice for the portion of their injuries found by the jury to have been caused by IAI, and if IAI must reimburse SP for 65% of the total damages awarded to the crew members, then IAI will be paying twice for its responsibility for injuries to the crew.

IAI argues that in the face of these releases, the crew members can seek recovery only for the equitable share of the injuries not attributable to IAI's actions. IAI asks, therefore, that the jury verdict in favor of the plaintiff crew members be reduced 65% and the counterclaim by SP be dismissed. IAI asks that its delay in asserting the defense of release be excused because attorneys representing it in this action did not previously understand the nature of the releases.[3]

The releases presented to the court are entitled "Deed of Release and Full and Final Accord." The one signed by Landau is dated January 20, 1971; Muscatel's is dated March 1, 1971; and Koren's July 3, 1970. Each recites that the party signing it has received a sum of money "in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense in respect of everything, directly or indirectly, connected with or resulting from the accident. . . ."[4] and that the money received "includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident." The releases recite further that in consideration of the funds received, the crew members waive

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[3] "The only reason the Releases were not raised earlier was that U.S. counsel for Israel Aircraft Industries, Ltd. and, apparently, counsel for the crew members as well as defense counsel were unaware of the fundamental difference between the law of Israel and the law of New York, which permits direct actions by employees against their employers." (Reply Memorandum of IAI, at pp. 8-9)

[4] The releases vary slightly in ways not material to the disposition of these motions. In this instance, Koren's release mentions the State of Israel as an additional party released.

and release all claims against IAI and the Ministry of Defense.[5]

The releases conclude:

> "6. It is known to me that IAI agreed to pay to me the amount of IL [with the appropriate amount recited] only based upon my above confirmation and statement." [6]

Below the signature of each plaintiff crew member is a signed statement by an attorney for IAI stating that he "read and thoroughly explained" the contents of the release to the person who signed it.

Post Trial Motions By SP

SP has cross-moved to amend its answer pursuant to Rule 15(d), F.R.Civ.P., to assert the defense of release and for judgment against plaintiff crew members. According to SP, under Israeli law at the time the releases were signed, the release of one tortfeasor by an injured party

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[5] Paragraph 3 of Landau and Muscatel's release reads as follows: "3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident."

Again, in ways not relevant here, the language in the release signed by Koren varies somewhat from the language quoted above.

[6] The appropriate amounts are: Landau—IL 75,000; Muscatel—IL 10,000; and Koren—IL 5,000.

released all tortfeasors.[7] SP argues that it should be allowed to amend its answer even after trial and a jury verdict because during pre-trial discovery IAI and the crew members failed to disclose the releases, despite SP's reasonable attempts to ascertain their existence. Moreover, SP contends there was no valid excuse for IAI's delay in asserting, as an affirmative defense to SP's counterclaim, that the crew members had released it from liability. Further, SP characterizes the failure to disclose and the concealment of the releases as a fraud upon the court necessitating judgment for SP against IAI and the crew members.

SP details various steps taken to discover all the facts relating to the relevant issues in this lawsuit. A notice for production of documents, served on plaintiffs on behalf of defendants included the following request:

> "11. All personnel records of the individual plaintiffs which are in the possession or control of ISRAEL AIRCRAFT INDUSTRIES, LTD., including but not limited to payroll, medical, hiring, training and work of the individual plaintiffs as employees of said ISRAEL AIRCRAFT INDUSTRIES, Ltd."

At a meeting between the attorneys for defendants and for IAI, the following interchange occurred:

> "MR. FITZSIMONS [for the defendants]: Do you have anything at all to produce with respect to item No. 11 calling for the personnel records of the individual plaintiffs?"
>
> "MR. SCHIERBERL [for plaintiffs]: Not at this time. We are obtaining those records and as soon as we have

[7] At present under Israeli law a release of one tortfeasor will not release all tortfeasors if the intention to pursue claims against the others is expressly stated in the release.

them I will give them to you" Transcript of Meeting of January 10, 1974, at pp. 120-121.

In spite of the request and the assurance, the releases were not included in the materials turned over to defendants.

During the deposition of plaintiff Muscatel, the following discussion took place:

"Q. Can you tell us what the 10,000 pounds lump sum payment you received from IAI represented?

A. I think there was an agreement between me and I.A.I. to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that. Was this money paid to you as a result of your injuries sustained in this accident?

A. Yes.

Q. Pursuant to the agreement between yourself and I.A.I., this money must be repaid to them out of any you might get as a result of this lawsuit?

A. Yes."

Deposition of Muscatel, July 24, 1974 at p. 40.

SP argues that the answer to the last question was false and misleading. The releases contain no language requiring repayment. SP maintains that the statement that the money was paid pursuant to such an agreement, lead it to believe that the payments were in the nature of workman's compensation, which would not require a release and which

would not bar or limit an action against a party other than the employer.[8]

While the crew members and IAI were still represented by Condon & Forsyth, the following interrogatories were asked by SP relating to crew members Muscatel and Landau:

> "12. Details of any injury payments made by IAI.
>
> 13. Whether or not any of the above-mentioned payments are taken into account and deducted from damages under Israeli law."
>
> (Israel Aircraft Industries, Limited, Re: Accident to Jet Commander 029 on January 29, 1970. List of questions relating to Mr. Zohar Landau and Mr. Mordechai Muscatel, 13th September, 1972.)

Muscatel responded:

> "12. Payment made by IAI IL 10,000.
>
> 13. . . . [P]ayment per para. 12 is not a question of law since it was an ex gratia grant; it was now agreed

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[8] IAI and SP make reference to additional agreements between IAI and the crew members, to which Muscatel may have been referring here. Under these alleged agreements, IAI would finance this lawsuit on behalf of itself and the crew members, subject to reimbursement of its expenses and of the original payments to the crew members if the action proved successful. Yet, even if Muscatel was confused about which agreement he was being questioned, which has not been contended, no step was ever taken to correct the false and misleading impression given to the defendants in his deposition of July 24, 1974.

It should be noted that these agreements have not been submitted to the court and are not referred to by any sworn affidavits. They are, however, referred to by Dr. David Hermann, retained by IAI as counsel, in his unsworn affidavit, at p. 4. IAI having submitted this affidavit, it can make no complaint if the court considers it in rendering this opinion.

> that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds."
>
> (Re: Accident to Jet Commander 029 on 21.1.1970, Mordechai Muscatel at p. 1.)

Landau's answer was:

> "12. Injury payment and reparation for loss of future income of the amount of IL 75,000 were made by IAI.
>
> 13. . . . The payment made by IAI is not subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds."
>
> (Re: Accident to Jet Commander 029 on 21.1.70, Zohar Landau, at p. 1.)

SP argues that the releases show that the payments were not ex gratia or gratuitous. Rather, says SP, the money was given for full consideration, *i.e.*, the execution of deeds of release.

Counsel for the crew members argues that IAI should be estopped from asserting the defense of release at this time. He now argues that the releases be declared invalid for a variety of reasons. For example, counsel states the agreements were contracts of adhesion, and that they were drawn in a manner that does not reflect the parties' true desires.[9]

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[9] At various points in the memoranda submitted to the court by Cousins on behalf of Koren, it is stated that this crew member denies signing a release. (Memorandum, pp. 25, 30, 31.) At other points in the memoranda, it is admitted that Koren signed such a release. (Memorandum at pp. 23, 33; Supplemental Memorandum at pp. 3, 6.) No sworn affidavit, however, was submitted by Koren denying that he has signed a release. Nor has counsel even sub-

II

Plaintiffs Cannot Now Profit From Disclosure of the Releases

The defenses that counsel seeks to assert on behalf of the crew members must be based on a factual predicate not present in this case. This court cannot conclude, absent sworn affidavits from counsel or from the plaintiffs themselves that, for example, any crew member was pressured into signing the release or that he did not understand the import of its terms. Were it necessary to determine the validity of the releases, the court would have received no help from plaintiff crew members by way of factual elaboration. The court does not, however, need to reach the validity of these releases in disposing of these motions. Their validity has not been factually controverted, and the releases have been kept secret too long by plaintiff crew members and by IAI to allow the parties secreting the releases to put their validity in issue at this juncture of the litigation.

Plaintiff crew members chose to bring this suit without mentioning the releases, and without asking the court to determine their rights under these agreements. They followed this theory through three years of litigation and nearly five weeks of trial before a jury. It is now too late in the day to alter their theory of the case. Had the releases been disclosed in a timely way, it would have been incumbent upon the court to determine their validity and effect under Israeli law. Indeed, it is possible that the

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mitted his own sworn statement clearly setting forth Koren's position. Since the signed original of the release is now part of the record, the court takes Koren's failure to submit an affidavit giving his version of the facts to constitute an admission that he signed the release as submitted. *See* Rule 56(e) F.R.Civ.P.

time spent on this case would have been drastically reduced had the existence of the releases been known. Certainly the jury verdict would have been affected by knowledge that IAI had been given full release by the crew members in consideration for payment of a sum of money. In *N.A.A.C.P.* v. *Alabama,* 360 U.S. 240, 243 (1959), the United States Supreme Court rejected Alabama's attempt to restructure its argument after a lengthy period of litigation had already ensued, stating:

> "[The State] now for the first time here says that it 'has never agreed, and does not now agree, that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all respects except for membership.' This denial comes too late. The State is bound by its previously taken position. . . ."

Similarly, it is now too late in this case for the crew members to argue for the first time that the releases are invalid, that they only release IAI, or that they were not signed voluntarily.

It is also too late for IAI to unearth the releases as a basis for dismissal of SP's counterclaim. IAI's lame excuse that its attorneys in New York did not understand the meaning of instructions drawn by its attorneys in Israel cannot justify its failure to disclose the releases as affirmative defense to SP's counterclaim. Even had a different conclusion been reached in respect to the crew members' claims, IAI would nevertheless be barred from using the release as a defense at this time. *See* Rules 8 and 12, F.R.Civ.P.

Rule 37 Warrants Dismissal of Plaintiffs' Claims

The releases should have been produced by IAI in response to SP's request to produce number 11. Additionally, Muscatel's deposition answers betray a lack of candor that cannot be tolerated of a litigant. The same is true of Muscatel's and Landau's answers to defendants' interrogatories, noted above. Since the answers of Muscatel and Landau to questions were evasive or incorrect, each response may be treated as a failure to answer. Rule 37(a)(3), F.R.Civ.P. The court has the power to dismiss all claims solely on the ground of failure to make proper responses to defendants' pre-trial discovery efforts. Rule 37(b)(2)(C), F.R.Civ.P.

Ordinarily, sanctions for failure of a party to respond to an opponent's discovery requests are not appropriate absent an existing court order to provide or permit discovery which has been disobeyed. Rule 37(b)(2)(C); *See United States* v. *Mensik*, 381 F. Supp. 672, 680 (N.D. Ill. 1974); 8 Wright and Miller, *Federal Practice Procedure*, § 2284, at p. 764. Yet, the protections and sanctions in the Federal Rules are not absolute and contemplate the use of judicial discretion in fashioning a broad range of remedies and procedures by which compliance with the discovery rules may be enforced. *Marshall* v. *Ford Motor Co.*, 446 F. 2d 712 (10th Cir. 1971); *B.F. Goodrich Tire Co.* v. *Lyster*, 328 F.2d 411 (5th Cir. 1964); Wright and Miller, *Ibid.* The facts of this case warrant the exercise of such discretion and a deviation from the general interpretation of Rule 37.

Defendants had no way of knowing what information and documents were being withheld, and thus could not have made the appropriate Rule 37 motion normally a prerequisite to court sanction under that rule. Moreover, to

a large degree it was the misleading and inaccurate statements by plaintiffs that kept defendants from making any such motion. The sanctions under Rule 37 were provided to prevent just the sort of developments in litigation that occurred here. Under these circumstances, sanctions against plaintiffs are appropriate even though there has been no violation of a specific court order to disclose particular information.

Fraud was Perpetrated on the Court Necessitating Sanctions Against Plaintiffs Under Rule 60(b)

Rule 60(b) empowers federal courts to "relieve a party . . . from a final judgment, order, or proceeding for the following reasons; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), ..." Although defendant SP has raised the issue of fraud on the court, it has not gone so far as to move under Rule 60(b)(3), F.R.Civ. P., to dismiss all claims of both plaintiffs on that basis. Nevertheless, the court on its own motion may take such action as is necessary in response to fraud of a serious dimension. *Universal Oil Products Co.* v. *Root Ref. Co.*, 328 U.S. 575 (1946); *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F. 2d 798 at 801 (2d Cir. 1960). When fraud has been committed on the court there is an injury to the public and to public institutions. The court has the right and the duty to protect itself and to right the wrong, and is not dependent on the actions of the parties to seek redress for the fraud. As the Supreme Court stated in *Hazel-Atlas Glass Company* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944):

> "[T]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect

> and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Our circuit has held that fraud on the court is "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kupferman* v. *Consolidated Research and Manufacturing Corp.*, 459 F. 2d 1072, 1078 (2d Cir. 1972), quoting, 7 Moore, *Federal Practice* ¶ 60.33 at p. 515 (1971 ed.) (footnote omitted). *See also, Serzysko* v. *Chase Manhattan Bank*, 461 F. 2d 699, (2d Cir.), *cert. denied*, 49 409 U.S. 883 (1972); *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc., supra.* While in *Kupferman* the Court of Appeals declined to find such fraud as would mandate vacating the earlier judgment in that litigation, it did so primarily because

> "it would be going too far to characterize as 'fraud on the court' [defendant's] failure to disclose an instrument [defendant] could have supposed reasonably—although as it now appears, erroneously—to have been known to his adversary." *Kupferman, supra,* at 1081.

There can be no doubt that in this case, however, plaintiffs knowingly and fraudulently withheld from defendants, the court and the jury, matters material to the fair dis-

position of claims presented in this lawsuit which were known by no one but themselves. This constituted a serious interference with the judicial process and dismissal of all claims of the plaintiffs seems the only appropriate course the court can take.

In the first instance, the complaints of the crew members signed by attorney William L. Schierberl make no reference to any releases, and demand recovery for each crew member without mention of money accepted in partial settlement. Having settled at least a portion of their claims for damages, the crew members could not expect to come in to court and ask to be compensated in full for these same injuries. It is outrageous that they did so. The crew members are educated, intelligent men. Two hold engineering degrees from American Universities. They were well aware that they signed releases and that a lawsuit demanding full compensation was being started in their names. Additionally, and perhaps more importantly in light of this circuit's holdings, the attorney who signed the pleadings on behalf of the plaintiff crew members was in a position to know what he was doing. Cousins, the attorney who replaced Schierberl as counsel for the crew members, admits in an unsworn statement that one of his clients informed him of the releases before the termination of the jury trial (Memorandum at p. 7.) Yet he took no positive step to bring these releases to the attention of the court and mentioned them only in response to the instant motions. It is thus clear that Cousins withheld material information from the court.[10] In responding to IAI's post-trial motion for summary judgment, Cousins argues at one point: "If

[10] Even now, with his clients' claims resting in the balance, Cousins continues to obfuscate the issues by failing to submit a single sworn affidavit from himself or any of his clients setting out the facts of these transactions in a way that might invite the court to draw some conclusion more favorable to the crew members.

the documents signed by the crew members were general releases, then Israel Aircraft is charged with knowing that and perpetrating a fraud upon the court, the defendants and their own employees." (Memorandum at p. 4.) The court agrees with this statement as regards the actions of IAI, but it also finds that the crew members were equally guilty in not disclosing the releases.

Although IAI's failure to assert the releases in its reply to defendants' counterclaim is not by itself a fraud on the court, when viewed together with other actions taken by IAI that omission becomes part of a clear pattern of deception. It is apparent that IAI withheld the information that the crew members had signed releases in the hope that the crew members might be awarded a large verdict from which IAI could recover the amounts it had paid the crew members pursuant to the releases. Indeed, the releases would never have been disclosed but for the fact that IAI was found largely responsible for the crash and the crew members' injuries. Thus it found itself faced with potential liability of $276,250 for its share of injuries to the crew members and being required to make two payments to crew members. Only because the jury returned a verdict not to IAI's liking were the releases disclosed. Such action on IAI's part is clearly fraud on the court.

It is also relevant to the issue of IAI's fraud on the court that shortly after the verdict, IAI's attorneys demanded of the individual crew members that pursuant to the releases they reduce the amount of their claim against SP by 65%, the amount by which IAI would be obligated to reimburse SP.[11] This demand occurred despite IAI's argument that its New York counsel did not understand the

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[11] See Dr. Hermann's affidavit ¶ 6. Again, though this is an unsworn affidavit, the court will recognize its existence. See note 8, *supra*.

import of the releases. Clearly this is an indication that the New York counsel entirely understood the import of the releases, and merely waited until after a verdict had been handed down to reveal the releases' existence.

In sum, this court holds that both the individual crew members and IAI have perpetrated a fraud on the court.

IAI's failure to produce the releases, Schierberl's false assurance to defendants that the entire crew members' files would be forwarded, Muscatel and Landau's false answers to written questions and Muscatel's misleading response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the defendants, court and jury of information having an important bearing on the dispute. The plaintiffs in this action had no reason to believe that the releases were known to the defendants. *Kupferman* v. *Consolidated Research and Manufacturing Corp., supra.* In fact, the attorneys here helped to make certain the releases remained secret. Plaintiffs' behavior mandates the imposition of the extreme sanctions available under Rule 60. *Hazel-Atlas Glass Co.* v. *A. Hartford Empire Co., supra; cf. Kupferman* v. *Consolidated Research and Manufacturing Corp., supra.*

Accordingly, the complaints of the plaintiff crew members and plaintiff IAI are dismissed in their entirety by the court *sua sponte*. The cross-motions are denied as moot. Defendants SP and Rockwell are awarded their costs.

IT IS SO ORDERED.

Dated: New York, New York
October 26, 1976

/s/ ROBERT L. CARTER
Robert L. Carter
U.S.D.J.

Opinion of District Court on Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5359

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

—against—

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants.

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CARTER, *District Judge*

OPINION

Plaintiffs Israel Aircraft Industries Ltd. ("IAI"), Zohar Landau, Mordechai Muscatel, and Hagai Koren ("the crew members") move for reargument and reconsideration of the court's decision of October 26, 1976, dismissing the complaints of the plaintiffs.

Facts[1]

This suit arises out of an airplane crash which occurred in Israel in January of 1970. The crew members, who were injured in this accident, and IAI, the owner of the aircraft, sued, among others, Standard Precision, a Division of

[1] The facts of this case have been set forth in greater detail in my October 26, 1976 opinion, *Israel Aircraft Industries, et al.* v. *Standard Precision, A Division of Electronics Communications, Inc., et al.*, —— F.R.D. —— (S.D.N.Y. 1976). My reasoning in this opinion will be considerably clearer if that opinion is read together with this one.

Electronic Communications, Inc. ("SP"), who was the manufacturer of the wing flap actuator which was alleged to have failed, causing the crash. SP counterclaimed against IAI on the ground that modifications by IAI to the wing flap actuator caused the crash.

After trial, the jury prorated 65% of the responsibility for the crash against IAI, and 35% against SP. SP's prorated liability to IAI for damage to the plane was held to be $301,000. SP's prorated liability to the crew members was held to be $148,750; IAI's to be $276,250.

After this verdict was reached, IAI made a post trial motion for judgment against SP on SP's counterclaim on the ground that the crew members had already been compensated by IAI in exchange for the execution of a release to IAI. IAI argued that if the motion were not granted the crew members would be compensated twice for their injuries. The crew members opposed this motion on the ground that IAI had waited too long to reveal the existence of these releases. SP cross-moved to amend its answer, to assert the defense of release and for judgment against the crew members.

After a careful review of the evidence presented the court by IAI and the crew members concerning the reasons for their failure to reveal the existence of the releases earlier in this litigation, the court dismissed the plaintiff's complaints pursuant to F.R.Civ.P. Rules 37 and 60 because of a failure to properly respond to defendants' discovery efforts, and because of fraud on the court. *See* October 26, 1976 opinion. The court found that:

> "[B]oth the individual crew members and IAI have perpetrated a fraud on the court.
>
> IAI's failure to produce the releases, Schierberl's [IAI's counsel] false assurance to defendants that the

entire crew members' files would be forwarded, Muscatel and Landau's false answers to written questions and Muscatel's misleading response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the defendants, court and jury of information having an important bearing on the dispute.

Accordingly, the complaints of the plaintiff crew members and plaintiff IAI are dismissed in their entirety by the court *sua sponte*." October 26, 1976 opinion, at 20-21.

Shortly after that opinion was filed, IAI and the crew members made the present motions.

No Hearing Was Required

Plaintiffs contend that their due process rights were violated because the court dismissed their complaints without holding an evidentiary hearing. There is no merit in this contention.

Plaintiffs cite *Universal Oil Products Co.* v. *Root*, 328 U.S. 575 (1946), and *Flaks* v. *Koegel*, 504 F. 2d 702 (2d Cir. 1974) in support of their argument. I read neither opinion, however, as requiring a hearing under the circumstances of this case.

In *Universal Oil*, the Supreme Court reversed a Court of Appeals ruling that taxed the losing party with the costs of the amici curiae. In its opinion, the Court did make the suggestion that a successful party should not be deprived of his judgment without the holding of a "proper hearing," *Universal Oil*, *supra* at 580-81, but this appears to be mere dictum since the Court based its holding on a different basis, *i.e.* that compensation should not be paid amici

curiae who have already been paid by private clients. While I agree with the general proposition that a judgment should normally be vacated only after a hearing has been held, I do not believe that a prior hearing must *always* be held. Nor do I believe that the court in *Universal Oil* intended by its dictum to impose such an absolute rule. Where, as in the instant case, the party facing dismissal has supplied in its moving papers all of the facts relied upon by the court in reaching its decision,[2] that party has had an adequate opportunity to present its version of the facts. Under such circumstances, no hearing is necessary to protect the rights of any party, and I do not believe *Universal Oil* requires one.

Nor do I read the Second Circuit's holding in *Flaks, supra,* as necessitating a hearing under the circumstances. *Flaks* held that where the defendants were faced with the problem of obtaining new counsel because their original counsel had been relieved, the number of interrogatories left unanswered was relatively small, and imposition of sanctions would result in the entry of a large default judgment, the District Court should not have ordered the entry of a default judgment without having conducted an evidentiary hearing to determine defendants' wilfullness in failing to answer interrogatories and to appear at depositions. In reaching this conclusion, however, the Court of

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[2] The essential facts which formed the basis for the court's dismissal of plaintiffs' complaints—that IAI and the crew members had signed releases which had never been revealed to the court, the jury or defendants until after the jury verdict had been reached, in spite of their obvious relevance to this case and the defendants' substantial discovery efforts—were revealed to the court by the plaintiffs in their post trial motion papers. Nothing that IAI or the crew members have submitted to the court in support of their present motions puts these facts in question.

Appeals specifically found that the District Court's order was based solely on the affidavits of counsel for the party seeking and benefiting from the dismissal. *Flaks, supra* at 710.

As I have just indicated, however, the parties whose claims have been dismissed in this case, the plaintiffs, are also the parties who supplied the court with the information on which the dismissal was based. Had the defendants supplied the court with the facts upon which dismissal was ordered, *Flaks* apparently would have mandated a hearing; but here plaintiffs were not barred from controverting the contentions and allegations upon which the court decision was based. They supplied in toto the foundations for the decision. It is, therefore, ludicrous for plaintiffs to contend that their due process rights were denied because in reaching its conclusion the court accepted the facts they supplied without giving them an opportunity to supply those facts in another form.

There Was A Sufficient Factual Basis for Dismissal of the Complaints

In support of the motion for reargument and reconsideration, plaintiffs have submitted numerous affidavits which they contend prove that there was no factual basis for dismissal of their complaints.

Both IAI and the individual crew members attempt to negate the finding of fraud on the court and jury and to excuse their failure to disclose the releases in response to defendants' discovery efforts by arguing that they did not intentionally keep secret the existence of the releases. Condon & Forsyth, IAI's counsel, contends that it did not even learn of the possibility of the existence of any releases

until after the jury had reached a determination on liability, and waited until after the jury's determination as to damages to reveal to the court the existence of the releases because it was only then that it was certain the releases were relevant to this case. *See* Schierberl affidavit, dated November 5, 1976, at pp. 2-3. IAI, through special counsel Hale Russell Gray Seaman & Birkett,[3] contends that even though the releases were in the crew members' personnel files, IAI not only did not realize that these releases were relevant to the litigation but also did not even realize that they had been named in a counterclaim until after the jury reached a verdict.[4] *See* Ron affidavit, dated November 17,

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[3] Hale Russell Gray Seaman and Birkett ("Hale Russell") have moved for an order allowing them to appear as special counsel for IAI, on the grounds that IAI may have differences of interest with Condon & Forsyth, or Condon & Forsyth's retaining client, the insurers of IAI; that IAI has had no opportunity to be heard directly in connection with this court's October 26, 1976 opinion; and that the court has reached an incorrect decision regarding IAI. Seidel affidavit, dated November 5, 1976. I have granted this motion to the extent that I have considered the affidavits submitted to me through Hale Russell on behalf of IAI. I should add, however, that I have not been presented with any evidence that suggests any significant differences of interest between IAI and Condon & Forsyth.

[4] I shall not detail IAI's attempt to prove that it was unaware of the relevance of the releases to the litigation; but in essence IAI argues that the real party in interest in this litigation was its insurer, and that IAI had limited contact with Condon & Forsyth, its attorneys of record, who were retained by the insurer. I find this excuse to be totally void of merit. As the party of record, IAI is responsible for actions taken on its behalf. A party cannot prosecute its claim through its attorneys of record, and then later attempt to isolate itself from adverse results that may occur on the ground that it had no contact with those attorneys. This is particularly so where, as here, that party first makes known to the court the fact that it is not the retaining party more than three years after the commencement of the litigation, after a jury trial has been held, and after the court had decided several post trial motions.

1976, at pp. 1-9. The individual crew members contend that they never knew that they had signed "general" releases, but believed they had released only IAI and the Ministry of Defense, and not being educated in the law saw no reason why the existence of the releases should be made known by them to the court or to the defendants. *See* affidavits of Landau, Muscatel, and Koren, dated November 7, 1976, November 7, 1976, and November 5, 1976, respectively.[5] The crew members' attorneys, Fuchsberg and Fuchsberg, on the other hand, contend that it was not until after the jury verdict that they realized the relevance of the releases, and that the information they had been supplied with by the crew members and by IAI gave them no reason to believe that there was any relevant information being withheld from the court or defendants. *See* Cousins's affidavit, dated November 5, 1976, at pp. 4-10.[6]

It is clear to me that these assertions do not undercut either the legal or factual basis of my decision.

As stated in the October 26, 1976 opinion, IAI should have turned the releases over to defendants pursuant to SP's discovery request for the personnel records of the

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[5] The crew members and their attorneys appear to believe that the court took the step it did only because it considered the releases to be "general", that is, to release all persons from any liability arising out of the airplane accident. This is not so. There is the possibility that the releases are "general" releases under Israeli law, as SP asserts, *see* October 26, 1976 opinion at p. 6, but there has been no finding to that effect. Whether the releases are general releases or not, they were obviously relevant to this litigation, and ignorance as to their legal effect is no excuse for the failure of the crew members to reveal them.

[6] Mr. Cousins contends that the information he was given by the crew members and by IAI's attorneys reasonably led him to assume that the crew members had simply received a workman's compensation-like payment, and therefore he had no reason to believe any release had been signed.

crew members. IAI admits, *see* Ron affidavit, dated November 17, 1976, at p. 9, that the releases were in the crew members' personnel files. Yet the materials turned over to defendants did not include the releases. IAI may not excuse itself for the failure to produce these releases on the ground that it did not understand the nature of the litigation—IAI was a named party in the litigation, and was represented by counsel who clearly understood what defendants were requesting. Furthermore, it is no excuse that IAI's attorneys, Condon & Forsyth, claim they did not know that any releases had ever been signed, since their client, a party to the releases, certainly knew of their existence. Given the obvious materiality of the releases to this litigation, IAI's failure to produce them warrants the extreme sanctions that I imposed.

The situation of the individual crew members is no different. Despite their assertions that they were unskilled in the law and did not realize that what they had signed were "general" releases,[7] the fact remains that the individual plaintiffs are well-educated men and at all times were fully aware that they had signed agreements releasing at least IAI and the Israeli Ministry of Defense. Nevertheless, they proceeded with the prosecution of their suit without ever revealing to the court, the jury or defendants that these releases existed, despite their obvious relevance to this litigation,[8] made even more obvious by the defen-

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[7] *See* footnote 5, *supra*.

[8] Even if the crew members' attorneys actually had no idea that the releases existed until after the jury verdict came down, and I do not believe that could have been the case, that would be no excuse for the crew members. They knew they had signed some kind of release in exchange for payment by IAI, and they should have made this fact known to the defendants and the court, or at least their attorneys, who would then have had an obligation to do so.

dants' discovery efforts.[9] Moreover, as I wrote previously, it is outrageous that the crew members, having already settled at least a portion of their claims, should come into this court and ask to be fully compensated for their injuries.

The bulk of the evidence presented to the court is meant to show that the failure of both IAI and the crew members to reveal the existence of the releases to the defendants or to the court until after the jury had reached a verdict on damages was excusable, since none of the plaintiffs or their attorneys knew that the releases existed and/or were relevant to this case until that time (more than three years after this case was commenced). Frankly, I find this too incredible to believe.

In conclusion, I have been presented with no evidence that causes me to question the correctness of my earlier opinion in this case. Accordingly, plaintiffs' motions for reargument and reconsideration, having been carefully considered, are denied.

So Ordered

Dated: New York, New York
January 4, 1977

/s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

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[9] *See* October 26, 1976 opinion, at 6-10, regarding defendants' discovery efforts. These efforts, had they been properly responded to, should have resulted in the production of the releases.

Affidavit of Service by Mail
Before Filing of Deferred Appendix

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

NATHANIEL F. KNAPPEN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 85 Willowdale Ave., Port Washington, New York 11050. That on the 14th day of February, 1977 deponent served the within Brief For The Appellant upon:

MENDES & MOUNT
Attorneys for Defendant-Appellant
27 William St.
New York, New York 10005

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs
Landau, Muscatel and Koren
250 Broadway
New York, New York 10007

the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office depository under the exclusive care and custody of the United States post office department within the State of New York.

/s/ NATHANIEL F. KNAPPEN
Nathaniel F. Knappen

Sworn to before me this
14th day of February, 1977

/s/ ABRAHAM L. MEILEN
Abraham L. Meilen
Notary Public, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1978

Affidavit of Service by Mail
After Filing of Deferred Appendix

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

KATHLEEN A. HORTON, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 3 Washington Square Village, New York, New York 10012. That on the 12th day of April, 1977 deponent served the within Brief For The Appellant upon:

MENDES & MOUNT
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27 William St.
New York, New York 10005

FUCHSBERG & FUCHSBERG
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Landau, Muscatel and Koren
250 Broadway
New York, New York 10007

the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressd wrapper, in a post office depository under the exclusive care and custody of the United States post office department within the State of New York.

Kathleen A. Horton
Kathleen A. Horton

Sworn to before me this
12th day of April, 1977

Abraham L. Meilen
Notary Public, State of New York
No. 31-9821552
Qualified in New York County
Commission Expires March 30, 1978

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